(1)

No. 98-8384-CFH
CAPITAL CASE

Title: Terry Williams, Petitioner
v.
John Taylor, Warden

Docketed:
March 5, 1999

Court: United States Court of Appeals for the Fourth Circuit

Entry	Date	Proceedings and Orders
	Mar 5 1999	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 4, 1999)
	Mar 5 1999	Application (98A746) for stay of executiion of sentence of death, submitted to The Chief Justice.
	Mar 23 1999	Brief of respondent John B. Taylor in opposition filed.
	Mar 25 1999	Reply brief of petitioner filed.
	Mar 31 1999	Application (98A746) referred to the Court by the Chief Justice.
	Apr 2 1999	Application (98A746) granted by the Court.
	Apr 5 1999	Petition GRANTED. limited to Questions 1a and b, 2, and 3 presented by the petition. SET FOR ARGUMENT October 4, 1999. **********
	Apr 12 1999	Motion of petitioner for appointment of counsel filed.
	Apr 20 1999	DISTRIBUTED. May 13, 1999 (Page 5)
	Apr 26 1999	Order extending time to file brief of petitioner on the merits until June 21, 1999.
	Apr 26 1999	Order extending time to file brief of respondent on the merits until August 20, 1999.
	May 17 1999	Motion for appointment of counsel GRANTED and it is ordered that Brian A. Powers, Esquire, of Washington, D.C., is appointed to serve as counsel for the petitioner in this case.
	Jun 18 1999	Order further extending time to file petitioner's brief on the merits to and including June 28, 1999.
	Jun 18 1999	Brief amicus curiae of American Civil Liberties Union filed.
	Jun 21 1999	Joint appendix filed.
	Jun 21 1999	Joint appendix in three volumes.
	Jun 21 1999	Brief amicus curiae of American Bar Association filed.
	Jun 24 1999	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Jun 25 1999	Motion of Marvin Frankel, et al., for leave to file a brief as amici curiae filed.
	Jun 28 1999	Brief of petitioner Terry Williams filed.
	Jun 28 1999	Brief amici curiae of Virginia College of Criminal Defense Attorneys, et al. filed.
	Jun 28 1999	Motion of Lance Banning, et al., for leave to file a brief as amici curiae filed.
	Aug 13 1999	CIRCULATED.
	Aug 13 1999	Record filed.
	Aug 19 1999	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Aug 20 1999	Brief of respondent John B. Taylor filed.
	Aug 20 1999	Brief amici curiae of California, et al. filed.
	Sep 20 1999	Reply brief of petitioner Terry Williams filed.

2 pp

No. 98-8384-CFH

Entry	Date	Proceedings and Orders
	Sep 20 1999	Letter from counsel for the petitioner received and distributed.
	Oct 4 1999	Motion of Marvin Frankel, et al., for leave to file a brief as amici curiae GRANTED.
	Oct 4 1999	Motion of Lance Banning, et al., for leave to file a brief as amici curiae GRANTED.
	Oct 4 1999	ARGUED.
	Oct 4 1999	ARGUED.

(2)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

No, 99 - 98-835V

- TERRY WILLIAMS,

Petitioner-Appellee,

v.

JOHN TAYLOR, Warden,
Sussex 1 State Prison,

Respondent-Appellant.

On Petition For A Writ of Certiorari To the
Court Of Appeals For the Fourth Circuit

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner Terry Williams, by counsel, respectfully requests leave to file the accompanying petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

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No. 99-98-858

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

TERRY WILLIAMS,

Petitioner-Appellee,

v.

JOHN TAYLOR, Warden,
Sussex 1 State Prison,

Respondent-Appellant.

On Petition For A Writ of Certiorari To the
Court Of Appeals For the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Imminent Execution Scheduled (April 6, 1999)

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Brian A. Powers *
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CAPITAL CASE

QUESTIONS PRESENTED

1. Where both the federal district court judge and state trial court judge who had originally sentenced Petitioner to death concluded that counsel's deficient performance was prejudicial under the test this Court articulated in Strickland v. Washington, did the Fourth Circuit err in denying relief by reformulating the Strickland test so that:

   a. ineffective assistance of counsel claims may be assessed under the "windfall" analysis articulated in Lockhart v. Fretwell even where trial counsel's error was no"windfall"; and

   b. the petitioner must show that absent counsel's deficient performance in the penalty phase, all twelve jurors would have voted for life imprisonment, even where state law would have mandated a life sentence if only one juror had voted for life imprisonment; and

   c. the petitioner cannot prevail without showing that, absent counsel's deficient performance in the penalty phase, the mitigating evidence would have outweighed the aggravating evidence even though the jurors who originally sentenced petitioner were free to impose a life sentence even if the aggravating circumstances outweighed the mitigating circumstance?

2. Did the Fourth Circuit err in concluding that, under 28 U.S.C. § 2254(d)(1), a state habeas court's decision to deny a federal constitutional claim cannot be "contrary to" clearly established Federal law as determined by the Court unless it is in "square conflict" with a decision of this Court that is "controlling as to law and fact"?

3. Did the Fourth Circuit err in concluding that, under 28 U.S.C. § 2254(d)(1), a state habeas court's decision to deny a federal constitutional claim cannot involve "an unreasonable application of" clearly established Federal law as determined by the Court unless the state court's decision is predicated on an interpretation or application of relevant precedent that "reasonable jurists would *all* agree is unreasonable"?

4. Does the Fourth Circuit's interpretation of 28 U.S.C. § 2254(d)(1), if statutorily sound, nonetheless violate Article III of the United States Constitution by improperly limiting the responsibility of federal courts to decide questions of federal constitutional law?

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

No. 99 -

TERRY WILLIAMS,

Petitioner-Appellee,

v.

JOHN TAYLOR, Warden,
Sussex 1 State Prison,

Respondent-Appellant.

On Petition For A Writ of Certiorari to the
Court Of Appeals For the Fourth Circuit

Imminent Execution Scheduled (April 6, 1999)

Terry Williams ("Williams" or "Petitioner"), a Virginia capital inmate, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, which reversed the District Court's grant of his petition for a writ of habeas corpus.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at Williams v. Taylor, 163 F.3d 860 (4th Cir. 1998). The opinion of the United States District Court for the Eastern District of Virginia, Alexandria Division, is styled Williams v. Pruett, CA-97-1527-A (April 7, 1998), and is reprinted in Appendix 1 to the instant petition. The opinion of the Virginia Supreme Court rejecting the recommendation of the Circuit Court of the City of Danville to grant the writ of habeas corpus and

direct a new sentencing hearing is reported at Williams v. Warden, 487 S.E.2d 194 (Va. 1997). The opinion of the Circuit Court of the City of Danville is styled Williams v. Netherland, Case No. LP88-81 (Aug. 15, 1996), and is reprinted in Appendix 2 to the instant petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit denying the writ of habeas corpus issued on December 18, 1998. The petition for rehearing and rehearing *en banc* was denied on January 22, 1999. Thereafter, on February 10, 1999, the state court entered an order setting Williams's date of execution for April 6, 1999.

Accordingly, he filed a Motion to Recall the Mandate and to Stay the Execution with the Fourth Circuit, which was denied on March 3, 1999. Williams is filing a motion for a stay of execution in this Court contemporaneously herewith. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), petitioner having asserted below and herein a deprivation of his rights under the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth Amendment to the United States Constitution, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

2. This case also involves the Fourteenth Amendment to the United States Constitution which applies the Sixth Amendment to the states and which provides, in pertinent part:

> No . . . State [may] deprive any person of life, [or] liberty . . . without due process of law.

3. This case also involves the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. In pertinent part, the AEDPA, 28 U.S.C. § 2254(d)(1) provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States . . . .

STATEMENT OF THE CASE

A. The Trial and Sentence

On November 3, 1985, Harris Stone was found dead in his bed. His death was not considered a homicide. The local medical examiner found no evidence of foul play and, based on Stone's 0.41% blood alcohol level, determined that he died of alcohol poisoning. Williams v. Commonwealth, 234 Va. 168, 360 S.E.2d 361, 363 (Va. 1987).

While in the Danville City Jail on a petit larceny charge in the spring of 1986, and while experiencing bizarre dreams and nightmares, Williams approached the police and confessed that he had struck Stone with a garden implement known as a mattock, and taken his wallet containing three dollars. Id. (See also JA 148-49, 156.)[1] Based on this confession and an autopsy of Stone's remains, which revealed a fractured rib and punctured lung consistent with a blow to the chest from a mattock, Williams was indicted for capital murder. Williams, 360 S.E.2d at 363.

At the conclusion of a two-day trial conducted on September 29 and 30, 1986, Williams was found guilty of both capital murder and robbery. At the sentencing hearing, the Commonwealth presented evidence of Williams's criminal record and the testimony of two psychiatric experts,

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[1] "JA" and "SJA" references are to the Joint Appendix and Supplemental Joint Appendix, respectively, filed with the appeal in the United States Court of Appeals for the Fourth Circuit, and reprinted in Appendix 3 to the instant petition.

including Dr. Arthur Centor from Central State Hospital, that Williams was a future danger, a conclusion that contradicted his pre-trial report to defense counsel. (JA 172; SJA 42.)

Williams's lead trial counsel -- who, at about the time of the trial, was in the throes of a Virginia State Disciplinary Board proceeding that resulted in a private reprimand (JA 211, 237-38, 240) -- waited until approximately one week before trial to begin preparing his sentencing case. (JA 279.) His investigation primarily consisted of very general questions of Williams and his mother, a woman with a fourth grade education. (JA 504, 510.) As a result, counsel came up with virtually nothing to present to the jury. Having failed to conduct a reasonable investigation of mitigating circumstances, trial counsel offered the jury only the testimony of Williams's mother and two former neighbors (one of whom he plucked from the courtroom audience at the last minute to testify) that Williams was "a nice boy," had never said a "bad word" in their presence, and had never hurt or threatened anyone in their presence. (JA 189-90, 194, 199, 202, 204, 469.) Trial counsel also offered the tape-recorded lay testimony of a psychiatrist that Williams had told him that he had taken the bullets out of a gun during an armed robbery so as not to hurt anyone, and felt he had been unfairly convicted of a crime in 1982. (JA 185-86.)[2] Based on this weak and useless testimony, the jury sentenced Williams to death.

B. The Direct Appeal

The Virginia Supreme Court affirmed the conviction and sentence of death on direct appeal on September 4, 1987. Williams v. Commonwealth, 234 Va. 168, 360 S.E.2d 361 (Va. 1987).

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[2]As the District Court observed, "[t]he testimony of all four witnesses covers approximately twenty pages of the transcript [of the sentencing proceeding], and does not mention anything about petitioner's childhood, mental ability, or anything else enumerated [in the omitted mitigation evidence]." (App. 1 at 25.)

Thereafter, the United States Supreme Court denied Williams's petition for a writ of certiorari with Justices Brennan and Marshall dissenting. Williams v. Virginia, 484 U.S. 1020 (1988).

C. The State Habeas Proceedings

1. Danville Circuit Court

Williams filed a petition for a writ of habeas corpus with the Circuit Court for the City of Danville on August 26, 1988. Although the Circuit Court dismissed most of Williams's claims, it granted him leave to amend his petition to add several claims regarding his trial counsel's ineffectiveness, including those relating to his trial counsel's mental disability which had led the Virginia State Bar Disciplinary Board to indefinitely suspend his license to practice law in September 1989. (JA 211, 237-38, 240, 873, 878-79, 881.) See also Williams v. Taylor, 163 F.3d 860, 864, 871 (4th Cir. 1998).

On June 15 and 16, 1995, the Danville Circuit Court conducted an evidentiary hearing on these claims. The undisputed evidence produced at the evidentiary hearing reflected that trial counsel had ignored substantial and readily-available mitigation evidence largely because he did not think to locate it, or erroneously believed with respect to certain records that the law did not permit him to obtain them.

Among other things, trial counsel failed to produce Williams's family services records, which, with focused inquiries of Williams's family members, would have revealed that:

- Williams was born at home, at only four pounds, to a woman who admittedly drank herself into a stupor with bootleg liquor almost daily while pregnant (JA 504-07);
- when Williams was one year old, he and his siblings were found by police and social services workers at home hungry and unclothed; surrounded by feces, urine, and filth; and ignored by drunken parents; and, consequently, were removed from their parents' custody (JA 507-08, 718-23, 901);

- Williams's mother was subsequently imprisoned for child neglect (JA 911-19), and for two years, Williams and his siblings remained in foster care homes, in one of which, his sister Olivia stated, they were treated "very badly" (JA 901);

- following Williams's return home, his father, Noah Williams, Sr., continued to drink heavily and frequently beat up Williams's mother (JA 520, 902); and witnessing these "hard fist fights" left Williams "huddle[d] up in the corner shaking, crying" (JA 520);

- the Danville Public School Home Visitation Reports reflected that Williams's "parents show no interest in the school program nor the children," "[t]he children are without food and proper clothes often" (SJA 39), and "[t]here are many home problems" (SJA 39; JA 902);

- as a child, Williams's father regularly tied him to a bed or held him "buck naked" so he could whip him with a belt or a switch (JA 509, 518, 896); and

- to avoid beatings by his father, Williams would spend the night outside hiding under boxes rather than come home (JA 522-23, 899, 903).[3]

Trial counsel also did not think to obtain Williams's correctional records. (JA 266.) Had he done so, he would have learned, or could have discovered through further investigation, that:

- while confined to various juvenile facilities as a youth, Williams exhibited positive behavior, did as he was told, and "[t]rie[d] extremely hard to please" (JA 727);

- Williams was "able to function very well in [Beaumont juvenile facility's] environment of routine controls" (JA 746);

- Williams was upgraded to "A custody" while at Patrick Henry Correctional Unit in Spencer, Virginia in the mid-1970s, meaning that "he was among those prisoners considered least likely to act in a violent, dangerous or provocative way" (JA 887-88);

- Williams was promoted to the Good Conduct Allowance ("GCA") Class I at Patrick Henry "due to exemplary reports from staff" (JA 937);

- Williams was eligible for work release during the final months of his stay at Patrick Henry, a status that required him to have a good prison record, "highly favorable staff evaluations," and the approval of the Richmond Central Classifications Office (JA 888-89);

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[3]As the District Court recognized, "Petitioner's childhood was particularly troubled. It is clear that Petitioner was not provided with basic necessities from a very early age." (App. 1 at 21.)

- Williams's positive response to a structured environment was specifically noted in an April 1982 psychological summary conducted of Williams by the Virginia Department of Corrections, which stated that Williams "appears to have experienced a traumatic, neglected childhood," and appeared to be "an individual without ingrained criminal tendencies who lacks the coping skills necessary to function as an independent adult" (JA 924);

- Patrick Henry's Assistant Superintendent Jimmie Joyce personally encountered Williams in the mid-1980s at the Chatham Correctional Unit, and remembered him as "a quiet, courteous, neat, cooperative and non-violent prisoner" (JA 886-89);

- Williams's "good behavior prompted the kitchen officer to select him to work in the guards' dining room," work that was given prisoners who "were regarded as trustworthy, and who did not pose a danger" (JA 886-89);

- Lt. Anthony Parrish, another correctional officer at Chatham, remembered Williams to be "cooperative and well-mannered" (JA 905);

- in January 1985, the year before Williams's trial in the instant case, Williams received an official commendation from prison officials at Chatham for returning, with all money and contents intact, a guard's lost wallet Williams had found (JA 905);

- while at Halifax Correctional Unit, where he was housed in the early 1980's, Williams reported key evidence to the authorities relating to a prison drug ring, conduct which brought another official commendation praising Williams for his extremely valuable assistance and "the concern he had for others" (JA 979); and

- Williams attended and successfully graduated from carpentry school while at the Martinsville Correctional Center in the late 1970's. (JA 883.)[4]

Trial counsel also did not present evidence that Williams was borderline mentally retarded (App. 1 at 24). Nor did he investigate Williams's current relationships, including those with his wife and daughter. (Id.) Had he done so, he would have learned that Williams had an eleven-year old child, Jennie, who attended the trial proceedings with her mother, Jenny Lee Williams, both of whom would have testified, had they been asked that Williams was a loving, kind and doting father. (JA 890-94.)

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[4]Both the Danville Circuit Court (App. at 20, 43) and the District Court (App. at 26-27) found Williams's prison record significant.

Finally, trial counsel did not even return the telephone call of Bruce Elliott, a respected Harrisonburg, Virginia accountant, who had called trial counsel and offered to testify for Williams. (App. 1 at 24; JA 884.) But for trial counsel's errors, the jury would have learned that:

- Elliott, head of his own certified public accounting firm in Harrisonburg, Virginia, had befriended Williams through a church ministry program in 1978 and had remained friends with him ever since (JA 882);
- Elliott visited Williams every two to three weeks while Williams was incarcerated in the Harrisonburg facility and regularly thereafter (JA 883);
- Elliott did not consider Williams a violent person and never "felt the least bit of fear" when he was around him (JA 883, 885);
- after Williams was paroled in the early 1980s, Elliott kept in contact with him, invited him to stay in his home overnight and took him to a football game in North Carolina (JA 883); and
- Elliott continued to visit Williams even after he was incarcerated for breaking and entering, and was struck at how Williams was "always concerned about making a good impression [on] those in charge of the correctional facilities" and how he was "proud of the work he performed while incarcerated" (JA 883-84).[5]

Based on this omitted evidence, the same Danville Circuit Court judge who had initially believed that a sentence of death was "just" and "appropriate" (JA 213) concluded that trial counsel's professional errors prejudiced Williams and violated his right to the effective assistance of counsel as required by the Sixth Amendment to the United States Constitution. "[W]ith so little favorable testimony in the way of mitigation," the court concluded, "and faced with much unfavorable evidence on the question of future dangerousness, this [omitted mitigation] information could have been critical in the jury's decision as to Williams's punishment." (App. 2 at 21.)

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[5]As the Danville Circuit Court concluded, Elliott's "testimony would have portrayed petitioner as a decent human being who struggled to prove his worth in spite of his being somewhat disadvantaged mentally, emotionally and financially." "This testimony, from a well-respected professional," the court continued, "would have had an impact on the jury on the question of future dangerousness, and could have tilted a juror to favor a life sentence." (App. 2 at 20.)

Accordingly, by order entered August 15, 1996, the Circuit Court of the City of Danville issued "Proposed Findings of Fact and Recommended Conclusions of Law"[6] recommending that the writ be granted and a new sentencing hearing ordered. (App. 2. at 42-44, 49.) The Circuit Court recommended denial of all of Williams's remaining claims. (App. 2.)

2. Virginia Supreme Court

Both Williams and the Commonwealth filed objections to the Danville Circuit Court's proposed findings of fact and recommended conclusions of law. Thereafter, the Virginia Supreme Court ordered special briefing on the one issue that the Circuit Court had determined warranted relief. With respect to the remaining claims, the Virginia Supreme Court affirmed the Circuit Court's recommendation of dismissal. Following briefing and oral argument on the claim that trial counsel's assistance was ineffective under Strickland v. Washington, 466 U.S. 668 (1984), the Virginia Supreme Court issued an opinion on June 6, 1997, disagreeing with the Danville Circuit Court's recommendation and denying the petition for a writ of habeas corpus. Williams v. Warden, 254 Va. 16, 487 S.E.2d 194 (1997).

Specifically, the Virginia Supreme Court concluded that even if Williams's trial counsel had failed to present readily available mitigation evidence -- and, as even that court recognized, "[t]here is no doubt there was such evidence; the facts really are not in dispute"[7] -- those omissions were not prejudicial. To reach that conclusion, the Virginia Supreme Court weighed the aggravating circumstances presented at Williams's trial against the omitted mitigating evidence and found that

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[6]Following the filing of post-hearing briefs, but before the Circuit Court issued its decision, the Virginia Supreme court assumed exclusive jurisdiction over the case, pursuant to newly enacted Va. Code Ann. § 8.01-654(C)(1)(Michie 1998). As such, the Circuit Court's findings and conclusions were required to be in the form of recommendations only.

[7]487 S.E.2d at 198.

"'[g]iven the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence the sentence imposed.'" Id. at 200. Additionally, the Virginia Supreme Court invoked the per se "no-prejudice" rule of Lockhart v. Fretwell, 506 U.S. 364 (1993), even though trial counsel's errors in this case, unlike in Lockhart, were not "'a windfall to which the law [did] not entitle him.'" Williams v. Warden, 487 S.E.2d at 198. (quoting Lockhart, 506 U.S. at 369-70). Williams's petition for rehearing was summarily denied by the Virginia Supreme Court on August 6, 1997.

D. Federal District Court Proceedings

On December 12, 1997, Williams filed a habeas corpus petition in the United States District Court for the Eastern District of Virginia, Alexandria Division, pursuant to 28 U.S.C. § 2254. On April 7, 1998, the District Court ordered that the writ be granted on the ground that Williams's trial counsel had been constitutionally ineffective in failing to present crucial evidence in mitigation during the sentencing phase of the proceeding. Concurring with the state habeas trial judge, the District Court concluded that:

> Given the amount of mitigating evidence not presented to the jury, the compelling nature of such evidence and the fact that none of such evidence was cumulative, the Court concludes that there is a reasonable probability that had the jury heard this evidence, at least one juror and perhaps all, would have concluded that the death penalty was not warranted.

(App. 1 at 30.)

In reaching this conclusion, the District Court concluded that the Virginia Supreme Court's decision finding no Strickland prejudice was "contrary to and involved an unreasonable application of" clearly established federal law. (App. 1 at 9-10, 14, 30-34.) Not only did the District Court find the Virginia Supreme Court's conclusion contrary to Strickland itself (App. 1 at 34), it also found error

in that court's application of Lockhart to this particular case because, unlike in Lockhart, trial "counsel's failure to introduce mitigating evidence was a right the law does recognize." (App. 1 at 33.) Finally, the District Court also found that certain of the Virginia Supreme Court's factual findings with respect to the nature and extent of the mitigating evidence were unreasonable within the meaning of 28 U.S.C. § 2254(d)(2).

E. Fourth Circuit Proceedings

The Commonwealth appealed and Williams cross-appealed from the decision of the District Court denying Williams's claims regarding trial counsel's mental illness and psychiatric experts. Affirming in part and reversing in part, the Fourth Circuit denied the writ on December 18, 1998. Williams v. Taylor, 163 F.3d 860 (4th Cir. 1998). "[A]ssum[ing], without deciding, that Williams's trial counsel were objectively unreasonable in failing to investigate, prepare and present certain evidence in mitigation of punishment during the sentencing phase of Williams's trial," Williams, 163 F.3d at 867, the Court of Appeals found no prejudice and, in so doing, approved the Virginia Supreme Court's rationale. Id. 867-68.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE FOURTH CIRCUIT'S REFORMULATED CRITERIA FOR PROVING PREJUDICE IN CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL CONFLICT WITH THIS COURT'S SETTLED JURISPRUDENCE.

Over the years, this Court has taken pains to develop the appropriate burdens of proof for habeas petitioners, the gradations of which are keyed to the constitutional right asserted. Thus, in Jackson v. Virginia, 443 U.S. 307, 324 (1979), a habeas petitioner seeking to overturn a conviction based on a claim that a verdict supported by insufficient evidence was, in and of itself, unconstitutional, faced the severe burden of showing that "no rational trier of fact" could have found him guilty beyond a reasonable doubt. Sawyer v. Whitley, 505 U.S. 333, 336 (1992), imposed the lesser, but nonetheless

exacting, "clear and convincing" burden of proof on a habeas petitioner claiming "actual innocence" as a procedural gateway to consider a successive petition. Farther down the scale,[8] but requiring still a more demanding burden than the "reasonable probability" test, are Murray v. Carrier, 477 U.S. 478 (1986), and Schlup v. Delo, 513 U.S. 298 (1995),[9] in which the Supreme Court announced the rule that a habeas petitioner asserting "actual innocence" as a gateway to review on the merits of his claim of constitutional error must show that it is "more likely than not" that no reasonable juror would have convicted him in light of the new evidence. Near the bottom of this scale is the "reasonable probability" test announced in Strickland.[10] While, under this standard as the Court explained, a petitioner must show something more than "that the errors had some conceivable effect on the outcome of the proceeding," he is not required to prove that "counsel's deficient conduct more likely than not altered the outcome in the case" to establish prejudice. Strickland, 466 U.S. at 693-94 (emphasis added).

In Williams v. Taylor, 163 F.3d 860 (4th Cir. 1998), the Fourth Circuit misapplied Strickland's "reasonable probability" rule of law in a way that effectively heightens the "reasonable probability" test for determining prejudice and thus the existence of constitutional error. Specifically, the court wrongly accepted the Virginia Supreme Court's use of Lockhart v. Fretwell, which created

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[8]Carrier's and Schlup's "more likely than not" standard imposes a lower burden of proof than the "clear and convincing" standard required under Sawyer. Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 151 (1995).

[9]As the Supreme Court explained in Schlup, "[t]hough the Carrier standard requires a substantial showing, it is by no means equivalent to the Jackson standard that governs review of claims of insufficient evidence." Schlup, 115 S. Ct. at 868.

[10]See also United States v. Bagley, 473 U.S. 667, 678 (1985) (a "reasonable probability" of a different result is "not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.")

a "windfall" exception to Strickland, for evaluating prejudice. The court also wrongly concluded that prejudice cannot be shown even if "one hypothetical juror might be swayed by a particular piece of evidence," a proposition that substantially elevates the prejudice calculus for Fourth Circuit litigants given that all it takes under Virginia law is the vote of one juror to defeat a sentence of death.[11] Finally, the court wrongly applied Strickland to approve the Virginia Supreme Court's creation and application of a rule that prejudice can never be shown if aggravating circumstances outweigh mitigating circumstances even if the sentencer, as was the case for Williams, never "weighed" the evidence in the first instance to determine the sentence.

In so deviating from the constitutional principles established by this Court in Strickland for establishing prejudice in this case, the Fourth Circuit has effectively imposed on Williams a burden more akin to the "clear and convincing evidence" standard of Sawyer or, at the very least, the impermissibly harsher "more likely than not"[12] standard of Schlup and Carrier. As shown below, the Fourth Circuit's misguided approach to determining prejudice does substantial damage to this Court's established habeas jurisprudence as articulated in Strickland and significantly erodes the Sixth Amendment's guarantee of counsel. These errors reflect a systemic dysfunction, and the Fourth Circuit's recurring trend in applying Strickland in such a fashion portends dire consequences for habeas litigants who seek to challenge their death sentences on the grounds of ineffective assistance of counsel. In short, because the only means of correction lies with this Court, certiorari should be granted.

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[11]Williams, 163 F.3d at 868.

[12]The "more likely than not" standard is "a stronger showing than that needed to establish prejudice" under Strickland. Schlup, 115 S. Ct. at 867 & n.45.

A. This Court Intended to Limit the Lockhart v. Fretwell Test of Prejudice to the Rare Case Where the *Strickland* Test Would Give the Petitioner an Underserved "Windfall."

In finding no prejudice from trial counsel's failure to investigate, present and prepare mitigation evidence, the Virginia Supreme Court concluded, in reliance on Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993), that "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant a defendant a windfall to which the law does not entitle him." 487 S.E.2d at 198. In finding no error in the Virginia Supreme Court's absorption of Lockhart into the mainstream Strickland analysis, the Fourth Circuit effectively approved of the use of a "windfall" analysis to evaluate ineffectiveness claims that are predicated on an attorney error that Williams had every right to claim -- namely, the right to have the jury consider, in deciding whether Williams would live or die, the compelling and substantial mitigation evidence that was available to but ignored by his trial counsel.

Strickland posited the following inquiry to determine whether counsel was constitutionally ineffective: was counsel s conduct professionally unreasonable, and is there a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different? 466 U.S. at 694. Seven years later, Lockhart presented the Court with an extraordinary set of facts to which Strickland's two-prong test did not readily apply. 506 U.S. at 371.

In Lockhart, trial counsel's alleged deficient performance was his failure to raise an objection which would have been legally valid if made at the time of trial, but which had been rendered invalid by the time of the state habeas hearing. Id. at 366. Applying Strickland, the lower court determined that trial counsel's error was professionally deficient and, but for counsel's error, the result of the proceeding would have been different. Id. at 367. Finding unpalatable the notion that a petitioner could obtain Strickland relief based on a performance deficiency that was no more than trial counsel's

failure to invoke for his client "a right the law simply does not recognize," Nix v. Whiteside, 475 U.S. 157, 186-87 (1986) (Blackmun, J., concurring), the Court in Lockhart created an exception to Strickland's "reasonable probability" test to ensure that Strickland did not provide a "windfall" to the petitioner. 506 U.S. at 370. In so crafting this "windfall" exception, the Court specified that if the complained-of deficient performance was an error to which the petitioner ultimately had no legal right, no prejudice will be found. Id. at 371.

This seemingly automatic finding of no prejudice in the face of an admitted attorney deficiency clearly makes Lockhart the exception to Strickland, not merely "a clarification" of Strickland, as the Fourth Circuit claimed. Williams, 163 F.3d at 869. In Strickland, the rule is that an unprofessional attorney error, but for which there is a reasonable probability that the outcome would be different, is sufficient to show prejudice. Lockhart, on the other hand, held that where an attorney unprofessionally fails to take an action to which the defendant has no current legal entitlement, there is no legal prejudice even if there is a reasonable probability that the outcome of the proceeding would have been different, because to grant the relief under those circumstances would give the petitioner a "windfall."

Indeed, as Justice O'Connor, the author of the majority opinion in Strickland, observed, the Court's Lockhart decision

> will, in the vast majority of cases, have no effect on the prejudice inquiry under Strickland v. Washington, [citation omitted]. The determinative question whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," Id. at 694, remains unchanged. This case, however, concerns the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry.

Lockhart, 506 U.S. at 373 (O'Connor, J., concurring).[13]

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[13]The Fourth Circuit's attempt to discount Justice O'Connor's characterization of Lockhart as applicable only to the "unusual" case, 163 F.3d at 869, is weak, indeed. The fact that Lockhart's author,

Rather than see Lockhart for the unique situation it presented and limit it accordingly, the Virginia Supreme Court seized on it as a tool to reject Williams's straightforward application of Strickland -- namely, that there was "a 'reasonable probability' that at least one juror would have been moved to spare Williams's life had he heard" the mitigation evidence trial counsel never thought or sought to develop -- as an unacceptable outcome determinative analysis. Williams v. Warden, 487 S.E.2d at 194, 199 (Va. 1997).

In so concluding, the Virginia Supreme Court plainly likened Williams's trial counsel's failure to investigate, prepare and present substantial and compelling mitigation evidence to an attorney error from which Williams had no right to escape. As the District Court correctly recognized in this case, however, Williams

> is entitled, by current law, to have all possible mitigating evidence put before the sentencing jury. Williams has demonstrated that there was significant additional mitigating evidence that was not offered to the jury at sentencing. Williams has satisfied the prejudice inquiry by showing not only a reasonable probability that "the outcome would have been different but for counsel's error," but, unlike Lockhart, also that counsel's failure to introduce mitigating evidence was a right the law does recognize.

(App. 1 at 32-33.)

Finally, contrary to the Fourth Circuit's conclusion, 163 F.3d at 866-67, in raising this challenge to the Virginia Supreme Court's reliance on Lockhart's "windfall" exception, Williams does not take issue with the observation in both Lockhart and Strickland that the ultimate inquiry in determining prejudice is whether the result of the proceeding was "fundamentally unfair" or "unreliable." In circling the wagons to preserve this rather unremarkable and elementary proposition,

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Chief Justice Rehnquist "made no such disclaimer," id., about the limitations of Strickland is hardly the point. Rather, what is significant is that the Chief Justice took no issue with Justice O'Connor's limitation of Lockhart, effectively acquiescing in her characterization of the decision, deference that was appropriately due her as Strickland's author.

the Fourth Circuit has missed Williams's point entirely. Rather than challenging the concept of "fundamental reliability" or "fairness," Williams embraces it as the hallmark of the type of meaningful and fair review that has eluded him on appellate review. Indeed, if "fundamental reliability" or "fairness" was truly all that Lockhart added to Sixth Amendment jurisprudence, Williams would have prevailed in the Fourth Circuit because, as the District Court and the Danville Circuit Court before it both recognized, Williams's death sentence is a fundamentally unfair and unreliable result given his attorneys' unprofessional performance in failing to investigate and present substantial mitigating evidence. Williams had a Sixth Amendment right to his counsel's effective performance in this regard, and preserving that right would give him no "windfall," only that to which he is entitled under a fair system of collateral review.

B. Where the Vote of One Juror Would be Enough to Result in a Different Outcome, the Fourth Circuit Stands Alone in Requiring the Petitioner to Provide Prejudice by Showing that All Twelve Jurors Would Have Changed their Votes.

In Strickland, the Supreme Court concluded that to show constitutional prejudice, there must be "a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Strickland, 466 U.S. at 694. A "reasonable probability," the Court continued, is "a probability sufficient to undermine confidence in the outcome." Id. Applying this rule of law to the fact that, in the Commonwealth of Virginia, a unanimous jury is required to impose a sentence of death, the District Court concluded that "there is a reasonable probability that had the jury heard [the omitted mitigation evidence] at least one juror and perhaps all, would have concluded that the death penalty was not warranted." (App. 1 at 30.)[14]

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[14]The Danville Circuit Court similarly concluded that the omitted mitigation evidence "could have tilted a juror to favor a life sentence." (App. 2 at 20) (emphasis added).

Rather than view the District Court's remarks as a straightforward application of Strickland's prejudice requirement to Virginia's capital sentencing scheme which requires unanimity to impose a sentence of death,[15] the Fourth Circuit concluded that Strickland prejudice cannot be shown even if "one hypothetical juror might be swayed by a particular piece of evidence," Williams, 163 F.3d at 868, and thus rejected the District Court's granting of the writ.

In so finding, the Fourth Circuit has, in effect, rewritten Virginia's capital sentencing scheme to impose a far heavier burden than the law requires. Thus, while no one disputes that the Virginia capital sentencing statute bars a sentence of death from being imposed if even one juror objects, the Fourth Circuit insists that the sentencing statute be ignored for purposes of determining Strickland prejudice in a post-conviction proceeding. Quite simply, in the Fourth Circuit, it is not enough for a habeas petitioner to satisfy the "reasonable probability-that-the-outcome-would-have-been-different" test by showing that "one hypothetical juror might be swayed by a particular piece of evidence," even if that juror is the quintessential reasonable, conscientious and impartial juror. Rather, in the Fourth Circuit, a habeas petitioner can demonstrate Strickland prejudice only if he can sway "twelve reasonable, conscientious, and impartial jurors." Williams, 163 F.3d at 868.

The Fourth Circuit's refusal to look at the "effect-on-one juror" for determining Strickland prejudice is contrary to authority in its sister circuits and thus presents a conflict fully ripe for this Court's adjudication. The Seventh Circuit, for example, appropriately factors in to Strickland's "reasonable probability" test the mathematical and undisputable probabilities inherent in a state sentencing scheme that takes just one juror -- as always, the quintessential reasonable, conscientious

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[15]See Va. Code Ann. §19.2-264.4(E) (Michie 1998). ("In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life").

and impartial juror -- to change the outcome of a sentence.[16] Thus, in Kubat v. Theriet, 867 F.2d 351, 369 (7th Cir. 1989), the Seventh Circuit held that trial counsel's failure to present available and compelling mitigation evidence at the sentencing phase, including the testimony of a law enforcement officer, was prejudicial because "if just one juror had been sufficiently influenced by the character testimony, the death penalty could not have been imposed." Likewise, in Emerson v. Gramley, 91 F.3d 898 (7th Cir. 1996), the Seventh Circuit honed in on the devastating impact of trial counsel's failure to present any mitigation evidence on petitioner's behalf at the sentencing phase of his capital murder trial. "[W]ith need to convince only one of twelve jurors to refuse to go along with a death sentence," and given the "irrefutable evidence of aggravating circumstances," the court concluded that the possibility that the omitted mitigation evidence "might have saved [Emerson] from the death penalty cannot confidently be reckoned trivial." Id. at 907. As the court explained,

> [t]he mitigation specialists' 30-page single-spaced report is a moving narrative of a life that one juror in twelve might find so bleak, so deprived, so harrowing, so full of horrors . . . as to reduce Emerson's moral responsibility for the murder of Byrd to a level at which capital punishment would strike that juror as excessive or one or more of the jurors would think Emerson deserving of mercy.

Id. (Emphasis added.)

Similarly, in Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992), the Ninth Circuit approved the "effect-on-one-juror" approach wrongly dismissed by the Fourth Circuit. In assessing "reasonable probability" for purposes of determining Strickland prejudice, the Ninth Circuit appropriately

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[16]This approach is fully consistent with that utilized by the Supreme Court in making such evaluations. In Schlup v. Delo, 513 U.S. 298, 329 n.48 (1995), for example, the Supreme Court recognized the utility and necessity of employing "probabilistic determinations" about the "likely actions of hypothetical 'reasonable' actors" in evaluating habeas claims. Indeed, the Court in Schlup did just that, finding that, because it was "more likely than not" that "a juror, conscientiously following a judge's instructions requiring proof beyond a reasonable doubt, would [not] vote to convict," id. at 331 (emphasis added), based on the proffered evidence of actual innocence, the petitioner's constitutional claim should be heard on the merits and not be deemed defaulted.

recognized that "the death penalty could not be imposed if even one juror was not convinced beyond a reasonable doubt that it should be." Id. at 620. Accordingly, the court concluded, "but for the deprivation of counsel's effective assistance at the penalty phase, the result would have been different.'" Id. (quoting 754 F. Supp. at 1501). As with its sister circuit in Kubat and Emerson, the Ninth Circuit recognized the need to assess prejudice for Strickland purposes in the applicable legal context of the state's sentencing scheme -- namely, that upon the objection of one juror, a sentence of death cannot issue. See also Harris v. Blodgett, 853 F. Supp. 1239, 1270 (W.D. Wash. 1994) (in a state that requires unanimity for a sentence of death, "[i]f a defendant can show that counsel's deficient performance by failing to present other mitigating evidence would have allowed any juror to vote against the death penalty, then he has shown that the result would have been different. This is known as the 'effect-on-one-juror approach.'"); Jones v. State, 504 S.E.2d 822, 830 (S.C. 1998) (Finney, C.J., dissenting) (reversible error for trial court to have sentenced petitioner to death "without the benefit of having the trial judge submit to the jury a mitigating circumstance to which he was entitled and which could have swayed the jury, or even one juror, to impose life despite the aggravating circumstances in this case"), petition for certiorari filed Jan. 5, 1999 .

Finally, in Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989), the Eleventh Circuit, although it denied the writ, clearly accepted the notion that for purposes of capital sentencing one juror can make a difference. The court noted that the jury had voted nine to three to recommend the death penalty; thus, "had three jurors voted differently, the recommendation would have been for life." Bertolotti, 883 F.2d at 1519 n.12. Rejecting "the argument that analysis of the 'reasonable probability' of a different verdict should vary according to the number of jurors voting to impose the death penalty," the court explained that "if there is a reasonable probability that one juror would change his

or her vote, there is a reasonable probability that a jury would change its recommendation." Id. *A fortiori*, in a system such as Virginia's that requires a unanimous verdict to impose the death penalty, the shift in one juror's vote would most certainly change the outcome of the proceeding.

In short, what is "reasonable probability" for purposes of determining Strickland prejudice in any given case depends, as it must, on the variables of the sentencing scheme. Clearly, it is easier to persuade one reasonable, conscientious, and impartial juror to hold out for life than it is to persuade twelve such individuals to do so and that is precisely what Virginia's capital sentencing scheme envisions by requiring unanimity as a predicate for a sentence of death.[17] A prejudice analysis that recognizes that elementary fact is precisely what Strickland requires.[18] Both the state court judge -- the same judge who originally sentenced Williams to death -- and the federal district court judge concluded that there is a "reasonable probability" that the substantial and compelling mitigation evidence that trial counsel ignored in this case would have changed the vote of at least one juror and thus produced a sentence of life, not death. The Fourth Circuit's rejection of this obvious conclusion -- concurred in by not one but two trial judges whose daily exposure to jurors and their reactions at trial make their conclusions in this case particularly noteworthy -- based on its plainly incorrect reading of Strickland, underscores the heightened burden the Fourth Circuit imposes on habeas litigants. This burden finds no place in the law of this Court and compels correction.

That the Fourth Circuit relied on Strickland to justify its erroneous rejection of the "effect-on-one-juror" approach further underscores its attempt to erode Strickland. Strickland stands only for the proposition that "[t]he assessment of prejudice should proceed on the assumption that the decisionmaker

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[17]Va. Code Ann. § 19.2-264.4(E).

[18]466 U.S. at 695 (governing legal standard of state sentencing scheme provides measure for "reasonable probability" of different outcome).

is reasonably, conscientiously, and impartially applying the standards that govern the decision" and that the decisionmaker "acted according to law." Strickland, 466 U.S. at 694-95.[19] It does not, as the Fourth Circuit urges, "stand for the proposition that a court cannot consider the effect of counsel's deficient performance on a single juror." Mak v. Blodgett, 970 F.2d 614, 621 (9th Cir. 1992). And it certainly does not stand for the proposition implicitly advanced by the Fourth Circuit that any juror who would have voted for life in this case could not have been acting "reasonably, conscientiously, and impartially" or according to law.[20]

C. The Fourth Circuit Failed to Honor the Distinction between a Weighing and a Non-Weighing State and thereby Imposed a Heightened Burden on Petitioners in Non-Weighing States.

In finding that Williams suffered no prejudice from his trial counsel's failure to investigate, prepare and present mitigating evidence for the jury's consideration during sentencing, the Virginia Supreme Court, quoting Strickland, concluded that

> '[g]iven the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating

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[19]Thus, the Strickland Court cautioned with respect to the particular facts before it, whatever the sentencing judge's particular sentencing practices might have been in the case below, they are "irrelevant to the prejudice inquiry." 466 U.S. at 695.

[20]The Fourth Circuit's distortion of Strickland is nowhere more evident than from a review of the context in which the "reasonabl[e], conscientious[], and impartial[]" juror language arose. The Court sought to answer the very narrow question whether the district court erred in allowing, at the federal habeas evidentiary hearing, state trial court judge who sentenced Strickland to testify in support of the state's case that the omitted mitigation evidence would have made no difference to the outcome. See 466 U.S. at 683, 695. The Court explained that the particular propensities of the specific judge were irrelevant to the determination of prejudice which should be decided objectively on the basis of what a reasonably prudent decisionmaker would conclude. This limited finding, however, that a "particular judge's sentencing practices," id. at 695, are irrelevant to the question of prejudice by no means supports the far different proposition advanced by the Fourth Circuit that prejudice cannot be determined even where there is a "reasonable probability" that one juror would have voted for life. Such plain overreaching is further evidence of the unprincipled erosion of the "reasonable probability" test for showing prejudice in the Fourth Circuit.

> circumstances outweighed the mitigating circumstances and, hence, the sentence imposed.' 466 U.S. at 700.

487 S.E. 2d 194, 200 (Va. 1997). Williams argued on appeal to the Fourth Circuit that the Virginia Supreme Court wrongly "weighed" the mitigating evidence that Williams's defense counsel should have presented against the aggravating evidence the Commonwealth presented. Such "weighing" of evidence in a state that does not utilize the "weighing" of evidence to impose a sentence of death, Williams argued, was clearly contrary to or an unreasonable application of clearly established federal law, and was thus due no deference under the AEDPA.

The Fourth Circuit disagreed. Notably, while the Fourth Circuit acknowledged that the Virginia Supreme Court did, in fact, "weigh" the aggravators against the mitigators to affirm the penalty of death, it concluded that such "weighing" was unrelated to any particular state sentencing scheme and was thus generally applicable to evaluate prejudice in all cases. Williams v. Taylor, 163 F.3d at 860, 870 (4th Cir. 1998). As such, the Fourth Circuit maintained, the Virginia high court's usage of the term "outweighed" was only in its "ordinary sense," 163 F.3d at 870, no different it contends than the Supreme Court's usage of the term in Strickland. The Fourth Circuit's conclusion, however, is wholly belied by the legal and factual underpinnings of Strickland and cannot save the Virginia Supreme Court's fatally-flawed analysis.

Moreover, the Fourth Circuit's decision undermines the bedrock principles of Strickland that the "governing legal standard"[21] of the state sentencing scheme provides the rod by which the "reasonable probability" of a different outcome but for counsel's errors may be measured. To ignore this "governing legal standard" and substitute in its place an all-purpose, fungible test that requires a finding of prejudice if aggravators outweigh mitigators effectively rewrites the rule of "reasonable probability" mandated

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[21] Strickland, 466 U.S. at 695.

by this Court, a result that does substantial damage to this Court's jurisprudence and which can only be corrected through a grant of certiorari.

1. The Virginia Supreme Court and the Fourth Circuit misapprehended and misapplied *Strickland*'s rule of law.

In Strickland, Justice O'Connor, writing for the majority, set the stage for the Court's ultimate holding by undertaking three tasks distinctly categorized in her decision: first, setting forth a detailed recitation of both the facts and the history of the case and the governing state capital sentencing law (466 U.S. at 671-84); second, articulating the rule of constitutional law to be applied henceforth to Sixth Amendment claims of ineffective assistance of counsel (466 U.S. at 684-98); and third, applying the new rule of law to the facts of the case (466 U.S. at 698-701).

As to the first task, the Court described, among other things, the basis of trial court's findings in support of the death sentence, quoting from the Florida Supreme Court's decision:

> With respect to each of the three convictions for capital murder, the trial judge concluded: "A careful consideration of all matters presented to the court impels the conclusion that there are insufficient mitigation circumstances . . . to outweigh the aggravating circumstances." See Washington v. State, 362 So.2d 658, 663-64 (Fla. 1978).

466 U.S. at 675. The crucial missing text in the above quote, signified by the ellipsis, is the citation to the Florida sentencing statute, Fla. Stat. Ann. § 921.141(b), which requires the jury to determine whether there are "insufficient mitigating circumstances to outweigh the aggravating circumstances" to impose a sentence of death. Florida's "weighing" statute requires the trial court then to "set forth in writing its findings upon which the sentence of death is based as to the facts . . . that there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. Ann. § 921.141(3)(b) (West 1998).

Having articulated the narrow rule of law -- namely, that to overturn a state court decision based on a claim of ineffective assistance of counsel, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"[22] -- the Court was then required to apply it to the facts of the case. "The governing legal standard plays a critical role" in that application, it determined. Id. at 695. As the Court further explained,

> [w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence, such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 695 (emphasis added). Answering that question based on the particular facts and state sentencing law presented, the Court concluded that "there is no reasonable probability that the omitted evidence would have changed the conclusion [of the trial court] that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." Id. at 700.

In short, Strickland makes clear that the prejudice analysis undertaken by a reviewing court, when determining the appropriateness of a sentence of death, must reflect an application of the legal principles that bound the sentencer in the first instance. In this case, the Virginia Supreme Court ignored that simple maxim. Instead, it blindly applied the wrong rule of law -- a rule of law that would have been appropriate to determine a sentence of death in Florida, but which was not appropriate to determine a sentence of death in Virginia.

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[22]Strickland, 466 U.S. at 694.

2. The Fourth Circuit's error imposes on Williams a heightened burden under *Strickland*

To have misconstrued this particularized application of Strickland's general rule to Florida's "governing legal standard" -- namely, weighing -- to decide prejudice in a non-weighing state necessarily imposed a heightened burden on Williams to show prejudice from his trial counsel's deficient omission of crucial mitigating evidence. In a strict weighing state, the jury would have no discretion to choose life if the aggravators outweighed the mitigators. In a non-weighing state such as Virginia, however, the jury is not required to balance aggravating factors against mitigating factors or to perform any "weighing" function at all. To the contrary, after one or both of the statutory prerequisites to the imposition of the death penalty is proven, the jury has complete discretion to choose whether or not to impose a death sentence and may consider any evidence in mitigation in making that choice. Indeed, it could "impose a life sentence even if it was not convinced of the existence of any mitigating circumstance," Gilbert v. Moore, 134 F.3d 642, 657 n.15 (4th Cir.) (*en banc*), cert. denied, 119 S. Ct. 103 (1998) (emphasis added).

The distinction between a "weighing" analysis and a "non-weighing" analysis is thus "not one of 'semantics' . . . but [is one] of critical importance" to the outcome of the sentencing decision. Stringer v. Black, 503 U.S. 222, 231 (1992). Compare Parker v. Dugger, 498 U.S. 308, 318 (1991) (in Florida, a weighing state, "the death penalty may be imposed only where specified aggravating circumstances outweigh all mitigating circumstances"); Stringer v. Black, 503 U.S. 222, 225 (1992) (in Mississippi, a weighing state, to impose a sentence of death, the jury "must find at least one of the eight statutory aggravating factors, and then it must determine that the aggravating factor or factors are not outweighed by the mitigating circumstances"), with Tuggle v. Netherland, 516 U.S. 10, 14 (1995) (in a non-weighing state, "a constitutional error in the admission or exclusion of evidence" may well affect "the jury's

ultimate decision, based on all of the evidence before it, to sentence petitioner to death rather than life imprisonment"); Buchanan v. Angelone, 118 S. Ct. 757, 759 (1998) (in a non-weighing state, state must prove statutory aggravator but jury may disregard it in fixing the defendant's punishment and, if it believes "from all the evidence" that the death penalty is not justified, the jury must choose life imprisonment); Zant v. Stephens, 462 U.S. 862, 873-74 (1983) (in Georgia, a non-weighing state, "the jury is not instructed to give any special weight to any aggravating circumstances" or to "balance aggravating against mitigating circumstances pursuant to any special standard"; thus, the "finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion")(emphasis added); Jones v. State, 504 S.E.2d 822, 829 (S.C. 1998) (Finney, C.J., dissenting) (weighing of aggravating and mitigating circumstances for determining Strickland prejudice in postconviction proceedings is improper in a non-weighing state because "life may be imposed irrespective of . . . [any aggravating circumstances] and even in the absence of any mitigating circumstances"), petition for cert. filed Jan. 5, 1999.

Where, as here, the jury is not required under any circumstance to impose a sentence of death, id., the Fourth Circuit's approval of the Virginia Supreme Court's "weighing" of aggravators against mitigators imposed on Williams a "governing legal standard" that is not, in fact, the "governing legal standard" in Virginia for determining the appropriateness of a sentence of death. And, in so doing, the Fourth Circuit has determined that it is not enough for a habeas petitioner to show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, but must show that the aggravating circumstances would not have been sufficient to outweigh the mitigating circumstances, a far different and harsher calculus.

In sum, requiring Williams to prove on postconviction review that which he was never required to prove to the sentencing jury -- namely, that the aggravating circumstances did not outweigh the

mitigating circumstances -- clearly imposes a heavier burden than is required by Strickland. The Fourth Circuit's error, borne of an expansive and impermissible interpretation of Strickland by the Virginia Supreme Court that the Fourth Circuit in its mode of undue deference (see section II, infra) fully accepted, denied Williams his Sixth Amendment right to counsel. Worse, the Fourth Circuit has embraced this legally unfounded approach to determining prejudice in other cases,[23] thus raising the specter of recurring and substantial constitutional errors that only this Court has the power to correct.

II. THE CIRCUIT COURTS ARE DEEPLY DIVIDED OVER THE PROPER INTERPRETATION OF THE AEDPA'S STANDARD OF REVIEW

The Fourth Circuit's refusal to find the Virginia Supreme Court's decision either "contrary to" or "an unreasonable application of" this Court's well-settled jurisprudence and, indeed, its effort to undermine the district court's recognition of the serious flaws in the Virginia Supreme Court's decision, is the obvious and direct result of its constricted and wholly unjustified interpretation of the AEDPA's standard of review. Believing itself compelled to defer to the state court's decision except under conditions that are, as shown below, virtually impossible to meet, the Fourth Circuit spurned the conclusion of the state trial court judge -- the same one who had originally approved Williams's sentence of death and who saw trial counsel's performance first-hand -- and the federal district court judge that, but for trial counsel's gross abdication of responsibility with respect to the presentation of mitigation evidence, there is a "reasonable probability" that he would not have been sentenced to death. As shown below, however, the constricted interpretation of section 2254(d)(1) adopted by the Fourth Circuit defies logic, eviscerates the statute, and does serious damage to the duty of federal courts to interpret and decide questions of constitutional law.

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[23] See, e.g., Plath v. Moore, 130 F.3d 595, 602 (14th Cir. 1997), cert. denied, 118 S.Ct. 1854 (1998); Fitzgerald v. Greene, 150 F.3d 357, 368 (4th Cir.), cert. denied, 119 S.Ct. 389 (1998); Barnes v. Thompson, 58 F.3d 971, 979 (4th Cir. 1995).

Moreover, as shown below, the Fourth Circuit's interpretation of the AEDPA's standard of review is at the extreme end of a notable split in the circuits on this issue and highlights the "interpretive conundrum of the statute." Green v. French, 143 F.3d 865, 870 (4th Cir. 1998). This split in the federal circuit courts will only worsen, not narrow, given the difficulty the courts have had in interpreting the AEDPA's standard of review. Indeed, as even the Fourth Circuit has conceded, "[c]orrectly defining 'contrary to' and 'unreasonable application of,' and distinguishing between the two terms for purposes of section 2254(d)(1), at first blush appears relatively simple"; "[u]pon reflection, however, it is evident that this appearance is deceptive, and that the intended meaning of these terms is not so clear at all." Green 143 F.3d at 869. See also Lindh v. Murphy, ___ U.S. ___, 117 S. Ct. 2059, 2068 (1997) ("in a world of silk purses and pigs' ears, [the AEDPA] is not a silk purse in the art of statutory drafting"); O'Brien v. Dubois, 145 F.3d 16, 20 (1st Cir. 1998) ("AEDPA is hardly a model of clarity" and "its standard of review provision is far from self-explicating"). Given the importance of this issue, and the need for stable and uniform application of the statute among the circuit courts and, particularly, to correct the Fourth Circuit's plainly unconstitutional interpretation of the AEDPA, it is imperative that this Court step in and provide authoritative guidance by granting certiorari.

A. It is the Role of the Federal Judiciary to Decide Issues of Constitutional Law and of this Court to Decide Generally Applicable Rules of Laws.

As it interprets the AEDPA's standard of review, the Fourth Circuit may not issue the writ:

> unless (a) the state court decision is in 'square conflict' with Supreme Court precedent that is controlling as to law and fact or (b) if no such controlling decision exists, 'the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant [S]upreme [C]ourt precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts.'

163 F.3d at 865, (quoting Green v. French, 143 F.3d 865, 870 (4th Cir. 1998), cert. denied, 119 S. Ct. 844 (1999) (emphasis added)).

1. "Contrary to"

In the court's view, a decision is 'contrary to' precedent:

> only when, either through a decision of pure law or the application of law to facts indistinguishable in any material way from those on the basis of which the precedent was decided, that decision reaches a legal conclusion or a result opposite and irreconcilable with that reached in the precedent that addresses the identical issue.

Green v. French, 143 F.3d at 870 (emphasis added). See also Wright v. Angelone, 151 F.3d 151, 156 (4th Cir. 1998) (relying on Green for proposition that decision must be "in square conflict" with Supreme Court precedent to justify relief under "contrary to" prong of AEDPA); Fitzgerald v. Green, 150 F.3d 357, 362 (4th Cir.) (same), cert. denied, 119 S. Ct. 389 (1998).

This pinched interpretation relegates this Court to a pedestrian forum for case-by-case adjudications that will necessarily have no bearing on the resolution of any future case. Quite simply, this is because no two cases ever present both the "identical" issue and facts that are "indistinguishable in any material way from those on the basis of which the precedent was decided." Green, 143 F.3d at 870. Such an interpretation, of course, defeats the very purpose of this Court's existence, which is to establish rules and principles of general applicability to govern future cases. Moreover, the Fourth Circuit's interpretation of the "contrary to" clause will ultimately render the clause defunct because the empty review it provides will necessarily default into the "unreasonable application of" analysis rendering the "contrary to" clause nugatory in violation of a fundamental maxim of statutory interpretation.[24]

There is also a significant divergence of analysis between the Fourth and First Circuits on the proper interpretation of 28 U.S.C. § 2254(d)(1)'s "contrary to" language. Compare Green v. French, 143

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[24]The first rule of statutory interpretation is "'to give effect, if possible, to every clause and word of a statute.'" United States v. Menasche, 348 U.S. 528, 538-39 (1955) (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)).

F.3d at 870 (opining that decision of Supreme Court governs a particular claim only if it was announced in a context both legally and factually "indistinguishable, in any material way" from the case before the habeas court) to O'Brien v. Dubois, 145 F.3d at 24-25 (explaining that a petitioner need not identify a factually identical precedent but rather must identify a Supreme Court case that provides an analytic framework designed to apply to a variety of factual contexts).

2. "Unreasonable Application of"

The Fourth Circuit's interpretation of the "unreasonable application of" clause suffers from different, but no less grave, infirmities. A state court decision, the court explained, is "objectively unreasonable" only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable. Williams, 163 F.3d. at 865, (quoting Green, 143 F.3d at 870 (emphasis added)). Said another way, if any jurist finds that relief is not warranted, a federal court is necessarily barred from granting relief because a single judge's disagreement with the decision to grant relief signifies that reasonable jurists do not all agree that the state court's decision was unreasonable.

Taken to its logical extreme -- not a distant journey here -- the Fourth Circuit's interpretation would prevent the writ from ever issuing if any reasonable jurist -- and one presumes that all jurists are reasonable -- were to conclude that the writ should not issue. Presumably, the pool of "reasonable jurists" to which the Fourth Circuit would defer includes all state court judges, because one must presume they are as "reasonable" as their federal counterparts. Thus, in any case in which one or more state judges voted to deny the writ, federal review would necessarily be barred because all reasonable jurists would not agree that the writ should be granted under applicable law. Of course, the only reason a case would be in federal court would be because relief had been denied in the state court. Thus, relief would be denied in every federal habeas case.

Giving every state jurist veto power over the grant of federal collateral relief in this manner vitiates the entire purpose of federal habeas review and nullifies the role of the federal judiciary to decide issues of constitutional law. See e.g Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Article III judges are "vested" with "judicial Power" that extends over all cases over which federal courts have jurisdiction and it is "emphatically the province and duty of the judicial department to say what the law is"); United States v. Klein, 80 U.S. (13 Wall). 128 (1871) (Congress's attempt to dictate to the Court a certain constitutional interpretation oversteps the required separation of powers between the legislative and the judicial branches of government). Moreover, in signing the AEDPA into law, the President made clear that section 2254(d), as amended, was not intended to "limit the authority of the Federal courts to bring their own independent judgment to bear on questions of law and mixed questions of law and fact"; otherwise, it "would be subject to serious constitutional challenge." Statement by the President Upon Signing the AEDPA of 1996 Into Law at 2-3 (April 24, 1996).

The Fourth Circuit's incorrect and unconstitutional interpretation of section 2254(d)(1), as articulated in Green v. French, 143 F.3d at 870, has been applied in a number of other cases in addition to this one. See, e.g., Fitzgerald v. Greene, 150 F.3d 357, 362 (4th Cir. 1998); Wright v. Angelone, 151 F.3d 151, 156 (4th Cir. 1998); Caldwell v. Greene, 152 F.3d 331, 339 (4th Cir. 1998); and Johnson v. Moore, 1998 WL 708691 (4th Cir. September 24, 1998).[25] All of these individual petitioners, and potentially many more, have been denied relief by the Fourth Circuit after having been unable to clear the appellate court's impermissibly high bar to federal review. Accordingly, review by this Court is essential.

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[25]We note that a petition for certiorari was filed in Johnson on January 19, 1999 and is currently pending before this Court.

B. There is a Split in the Circuits Over the Proper Interpretation of the "Unreasonable Application of" Prong of the AEDPA.

The Fourth Circuit's interpretation of the "unreasonable application of" clause of the AEDPA suggests a stark abdication of federal responsibility for the protection of rights guaranteed by the federal constitution. Likewise, the Fifth Circuit has defined the AEDPA's "unreasonable application" of clearly established federal law standard of review to mean that "reasonable jurists considering the question would be of one view that the state court ruling was incorrect." Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir. 1996), cert. denied, 520 U.S. 1107 (1997) (emphasis added). To apply this principle illustrates its illogic. In the words of the Drinkard majority:

> [we have] unequivocally concluded that the instruction at issue did not place mitigating evidence of intoxication beyond the reason of the jury. Judge Garza [dissenting], on the other hand, has concluded that the challenged instruction removed the mitigating evidence of intoxication from the jury's consideration. It follows that when the jurists considering the state court ruling disagree in this manner, the application of the law by the state court is not unreasonable. The AEDPA therefore bars us from granting relief to Drinkard on this claim.

By parity of reasoning, one 'one dissent, including the dissent of a sole judge to an en banc majority's decision to grant the writ, would bar AEDPA relief because the existence of a dissent on either side of the question means that the proposed interpretation of federal law is not one "that reasonable jurists would all agree is unreasonable." Williams v. Taylor, 163 F.3d 860, 865 (4th Cir. 1998) (emphasis added). This ill-fated logic, which both the Fourth and Fifth Circuits share, has also been accepted by the Eleventh Circuit in Neelley v. Nagle, 138 F.3d 917, 924 (11th Cir. 1998), cert. denied, 119 S. Ct. 811 (1999), (quoting Drinkard, court adopts standard that under the AEDPA "a federal court can grant the writ 'only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists'").

The Fourth Circuit's constricted view of the AEDPA's standard of review is fundamentally at odds, however, with the First and Seventh Circuit's approach to this issue. In Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996), cert. granted in part, 117 S. Ct. 726, judgment rev'd on other grounds, 117 S. Ct. 2059 (1997), for example, the Seventh Circuit reached a wholly different conclusion than the Fourth Circuit on the AEDPA's "unreasonable application of" clause. In asking "[h]ow much leeway does the 'unreasonable application' language create," the court answered

> [n]one on questions of interpretation. It does not authorize or permit state courts to deviate from the Constitution. Federal courts acting within their jurisdiction are always entitled to interpret the law independently. Section 2254(d)(1) as we read it does no more than regulate relief. It tells federal courts: Hands off, unless the judgment in place is based on an error grave enough to be called 'unreasonable.'

96 F.3d at 870. When, then, is a state court decision "unreasonable?" As the Seventh Circuit continued to elucidate in Hall v. Washington, 106 F.3d 742 (7th Cir.), cert. denied, 118 S. Ct. 264 (1997) the "statutory 'unreasonableness' standard allows the state court's conclusion to stand if it is one of severally equally plausible outcomes." But,

> [o]n the other hand, Congress would not have used the word 'unreasonable' if it really meant that federal courts were to defer in all cases to the state court's decision. Some decisions will be at such tension with governing U.S. Supreme Court precedents . . ., or so arbitrary, that a writ must issue.

106 F.3d at 749.[26] See also Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir.) (testing reasonableness of a state decision by "whether the determination is at least minimally consistent with the facts and circumstances of the case"), cert. denied, 118 S. Ct. 72 (1997).

The First Circuit, in O'Brien v. Dubois, 145 F.3d 16 (1st Cir. 1998), was similarly disinclined to apply the narrow reading of the "unreasonable application of" clause adopted by the Fourth Circuit.

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[26]Notably, in Hall, the Seventh Circuit applied the AEDPA to find, on facts remarkably similar to the instant case, that petitioner's counsel's failure to prepare and present a mitigation case at the capital sentencing hearing was constitutionally ineffective under Strickland. See also, section II.C, infra.

The question to be asked, in the First Circuit's view, is only whether the state court's decision "appears objectively reasonable" (emphasis added) and, to the "extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of the state court's treatment of the contested issue." Id. at 25. In sum, while the First Circuit would not grant the writ under the AEDPA simply if it disagreed with the state court's decision or would have reached a different result, it nonetheless recognized that across-the-board deference, as advocated by the Fourth and Fifth Circuits, "may intrude impermissibly upon the federal courts' Article III power 'not merely to rule on cases, but to decide them.'" Id. at 21, (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995)).

Given the lack of clarity of the AEDPA, and the significant splits in analysis among the circuits, it is critical that the Court grant review to provide much-needed guidance on this issue. Such lack of clarity is particularly harmful to capital habeas petitioners in the Fourth Circuit who are subject to much narrower interpretations of both prongs of section 2254(d)(1) than such petitioners in other circuits. Given the high stakes for these petitioners, it is essential that the Court grant review.

C. Had the Fourth Circuit Applied the Governing Legal Principles Correctly in this Case, the Writ Would Have Been Granted and a New Sentencing Hearing Ordered.

As shown above, the Fourth Circuit's decision in this case illustrates the overreaching that was required in order for the Fourth Circuit to uphold the flawed decision of the Virginia Supreme Court denying Williams the writ and, concomitantly, to undermine the decision of the district court granting the writ. Had the Fourth Circuit evaluated the Virginia Supreme Court's decision with an eye toward its "objective reasonableness," see O'Brien v. Dubois, 145 F.3d 16, 25 (1st Cir. 1998), rather than with the unwarranted deference it felt constrained to apply under the AEDPA, and had it not applied a skewed

application of Strickland's prejudice prong, the only reasonable and defensible conclusion it could have reached would have been to grant the writ.

As the First Circuit in O'Brien explained, to the "extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of the state court's treatment of the contested issue." O'Brien, 145 F.3d at 25. The following numerous decisions of other federal courts amply demonstrate the unreasonableness of the Virginia Supreme Court's decision in this case. See, e.g., Dobbs v. Turpin, 142 F.3d 1383, 1388 (11th Cir. 1998) (finding that failure to present evidence of petitioner's troubled childhood, including alcohol abuse and domestic violence in petitioner's childhood home was prejudicial); Collier v. Turpin, 155 F.3d 1277, 1293-97 (11th Cir.) (finding that counsel's failure to present evidence during sentencing phase of petitioner's family relationships and of petitioner's specific heroic acts was ineffective assistance); Smith v. Stewart, 140 F.3d 1263, 1270 (9th Cir.) (finding failure to discover any mitigating evidence at penalty phase to be ineffective assistance of counsel where counsel merely asked general questions of petitioner and his mother and "conducted none of the real probing for information that legal praxis assumes and even demands"; failure to introduce evidence of positive family relationships, including that petitioner was a loving father was prejudicial), cert. denied, 119 S. Ct. 336 (1998); Austin v. Bell, 126 F.3d 843, 848-49 (6th Cir. 1997) (finding that counsel's failure to investigate possible mitigating evidence, and failure to present testimony of family and friends who were available and willing to testify on the petitioner's behalf, so undermined the adversarial process as to render the petitioner's death sentence unreliable), cert. denied, 118 S. Ct. 1526 (1998); Groseclose v. Bell, 130 F.3d 1161, 1170 (6th Cir. 1997) (writ granted where trial counsel failed to present any meaningful mitigation evidence, including testimony of family members); Hall v. Washington, 106 F.3d 742, 749 (7th Cir. 1996) (counsel's decisions not to call witnesses deserve no deference under Strickland where counsel did not investigate

what witnesses testimony would be), cert. denied, 118 S. Ct. 264 (1997); Emerson v. Gramley, 91 F.3d 898, 906-07 (7th Cir. 1996) (prejudicial for trial counsel to have failed to conduct any investigation of possible evidence in mitigation and failed to introduce evidence of petitioner's low intelligence and childhood injury), cert. denied sub nom., Emerson v. Gilmore, 117 S. Ct. 1260 (1997); Antwine v. Delo, 54 F.3d 1357, 1365-68 (8th Cir. 1995) (counsel was ineffective for failing to effectively investigate and present evidence of petitioner's mental impairment at the penalty phase of capital trial); Hendricks v. Calderon, 70 F.3d 1032, 1044 (9th Cir. 1995) (trial counsel's failure to present readily available mitigation evidence concerning petitioner's abused childhood and mental problems "sufficiently undermines confidence in the fairness of the death verdict to satisfy the prejudice prong of Strickland"); Glenn v. Tate, 71 F.3d 1204, 1211 (6th Cir. 1995) ("quite clear" prejudice where trial counsel failed to present mental history and evidence of defendant's near-retardation); Jackson v. Herring, 42 F.3d 1350, 1369 (11th Cir. 1995) (prejudice where evidence of "good character in [defendant's] relationships with her family," as well as abusive family life and positive employment history, was not presented to jury); Hill v. Lockhart, 28 F.3d 832, 845-47 (8th Cir. 1994) (counsel's failure to discover or present evidence of defendant's medical history rendered penalty phase fundamentally unfair); Wade v. Calderon, 29 F.3d 1312, 1323-25 (9th Cir. 1994) (attorney's almost complete failure to present mitigating evidence during penalty phase was ineffective assistance); Brewer v. Aiken, 935 F.2d 850, 858 (7th Cir. 1991) (reasonable probability that had jury been aware of defendant's low IQ and deprived background, it would have concluded that the "balance of aggravating and mitigating circumstances did not warrant death"); Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991) (ineffective assistance of counsel not to present sympathetic evidence); Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989) (ineffective not to call a deputy sheriff as a character witness); Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989) (prejudice where jury did not know that defendant was "a devoted father, husband and brother" and was

"a decent, loving man whose life was important to them"); Middleton v. Dugger, 849 F.2d 491, 495 (11th Cir. 1988) (reasonable probability that introduction of evidence of brutal treatment and neglect during petitioner's childhood would have totally changed the evidentiary picture); Martinez-Macias v. Collins, 810 F. Supp. 782 (W.D. Tex. 1991) (ineffective assistance to forego investigation and use of family members' testimony without knowledge of what that testimony would be), aff'd, 979 F.2d 1067 (5th Cir. 1992); Mathis v. Zant, 704 F. Supp. 1062, 1065 (N.D. Ga. 1989) (defendant prejudiced where trial counsel failed to introduce evidence of an abusive, alcoholic father and defendant's mild retardation), appeal dismissed, 903 F.2d 1368 (11th Cir. 1990).

These decisions not only underscore the unreasonableness of the Virginia Supreme Court's decision, they illustrate graphically the "reasonable probability" that, but for trial counsel's substantial and inexcusable errors in presenting a mitigation case for Williams, he would not have been condemned to die. The Danville Circuit Court believed this to be true, as did the federal district court, and thus reached the only reasonable conclusion possible -- namely, that the writ should be granted and Williams given a new sentencing hearing.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari in this case.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

TERRY WILLIAMS,

Petitioner

v.

JOHN B. TAYLOR, WARDEN,
SUSSEX I STATE PRISON,

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit and Application
for a Stay of Execution

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant a stay of execution and certiorari to review the Fourth Circuit's routine, fact-bound application of Strickland v. Washington and its conclusion that Williams failed to demonstrate that he was prejudiced by counsel's failure to present certain mitigating evidence at his 1986 capital sentencing proceeding?

2. Does the Fourth Circuit's de novo review of petitioner's ineffective counsel claim render moot his argument about the Court of Appeals' interpretation of 28 U.S.C. § 2254(d)?

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U.S.S.Ct. Rule 10 10

No. 98-8384
A-746

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

TERRY WILLIAMS,

Petitioner

v.

JOHN B. TAYLOR, WARDEN,
SUSSEX I STATE PRISON,

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit and Application
for a Stay of Execution

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On September 30, 1986, Terry Williams was convicted of the capital murder of Harris Thomas Stone in a jury trial in the Circuit Court of the City of Danville, Virginia. In a separate penalty proceeding, the jury fixed Williams' sentence at death based on its finding of future dangerousness, see Va. Code § 19.2-264.4(C), and the trial court sentenced Williams to death on November 19, 1986.

The Supreme Court of Virginia unanimously affirmed the convictions and death sentence on direct appeal. Williams v. Commonwealth, 360 S.E.2d 361 (Va. 1987). This Court denied certiorari on January 11, 1988. Williams v. Virginia, 484 U.S. 1020 (1988).

Williams' habeas corpus petition was filed in the Danville Circuit Court on August 26, 1988. More than six years later, an amended petition was filed on April 24, 1995, and the circuit court held an evidentiary hearing on Williams' claims of ineffective assistance of counsel on June 15 and 16, 1995.

On July 1, 1995, jurisdiction over the case was transferred to the Virginia Supreme Court pursuant to amendments to Virginia Code § 8.01-654. The Virginia Supreme Court directed the lower court to report findings for the claims involved in the hearing, and the circuit court filed its findings on August 15, 1996. On January 13, 1997, the Virginia Supreme Court ordered briefing and argument on the one ineffective assistance of counsel claim that the circuit court had recommended for relief, and accepted the circuit court's findings recommending dismissal of all other claims.

On June 6, 1997, the Virginia Supreme Court unanimously rejected the circuit court's recommendation for relief, and denied the writ. Williams v. Warden, 487 S.E.2d 194 (Va. 1997). Following the denial of Williams' petition for rehearing on August 1, 1997, the Danville Circuit Court set an execution date of October 7, 1997.

On September 29, 1997, Judge James C. Cacheris of the United States District Court for the Eastern District of Virginia in Alexandria stayed Williams' execution and appointed counsel to represent Williams for his federal habeas corpus petition. Williams' petition was filed on December 12, 1997. On April 7, 1998, the district court ordered that the writ be granted with

respect to Williams' allegation that trial counsel were ineffective in failing to present certain mitigating evidence, and directed that Williams be re-sentenced. The remaining allegations in Williams' petition were dismissed.

On December 18, 1998, the United States Court of Appeals for the Fourth Circuit reversed the district court's order granting the writ, finding that Williams' ineffective counsel claim did not merit relief and that the Virginia Supreme Court's rejection of Williams' claim was not contrary to, nor an unreasonable application of, clearly established precedent of this Court. Williams v. Taylor, 163 F.3d 860, 869-870 (4th Cir. 1998). The Fourth Circuit affirmed the district court's dismissal of Williams' remaining claims. Williams' petition for rehearing was denied on January 15, 1999, without a single judge of the Fourth Circuit asking for a vote on the petition. The Court's mandate issued on January 25, 1999.

On February 10, 1999, as required by Virginia Code §53.1-232.1(iii), the Danville Circuit Court set Williams' execution for April 6, 1999. On February 22, 1999, Williams asked the Fourth Circuit to recall its mandate and issue a stay of execution. The Court of Appeals denied Williams' motion on March 3, 1999.

STATEMENT OF FACTS

The Crimes

The Virginia Supreme Court set out the facts of Williams' crimes in its opinion upholding his convictions and death sentence on direct appeal:

> Stone, an elderly man who resided on Henry Street in Danville, was found dead in his bed shortly before 2:00 a.m. Sunday, November 3, 1985. There was no sign of a struggle, no blood was observed on Stone's body, and he was fully clothed. Despite a diligent search, Stone's wallet, which he customarily kept fastened in the back pocket of his pants, was never found.

> The local medical examiner, who examined the body about 9:30 that Sunday morning, noted an abrasion on the chest, but no bruising. Stone's history of heart disease and the police failure to report anything suspicious about the circumstances of Stone's death led the local medical examiner to conclude that Stone's death was due to heart failure. However, when Stone's blood alcohol content was later analyzed and was reported to be 0.41%, the regional medical examiner's office in Roanoke amended the finding of the cause of death to alcohol poisoning. Stone's daughter testified Stone looked "a little high" when she last saw him entering his house shortly after 6:00 p.m. on Saturday, November 2, 1985.
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> When the funeral director, Jack Miller, observed Stone's body on Monday morning, he called a bruise or abrasion over the left ribs to the attention of the police. The police told Miller that the local medical examiner believed the bruise was an old one. Though Miller disagreed with the local medical examiner, on instructions from the police he embalmed the body.
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> Almost six months later, the chief of police in Danville received an anonymous letter from an inmate of the local jail in which the author admitted killing "that man Who Die on Henry St." The police interviewed Williams, an inmate of the Danville jail at the time, who eventually admitted that he had written the letter and later gave multiple confessions to the murder and robbery of Stone. Williams said he had first struck Stone in the chest, and later on his back, with a mattock and had removed three dollars from Stone's wallet.
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> Stone's body was exhumed. On July 2, 1986 Dr. David Oxley, a forensic pathologist and Deputy Chief Medical Examiner for Western Virginia, performed an autopsy. When Dr. Oxley opened the body, he found Stone's fourth and fifth ribs on the left side had been fractured and displaced inward, puncturing the left lung and depositing a quantity of blood in the left chest cavity.

Williams v. Commonwealth, 360 S.E.2d at 363-364. See 28 U.S.C. § 2254(e)(1) (state court findings of fact presumed correct, and petitioner may overcome only with "clear and convincing evidence"); Sumner v. Mata, 449 U.S. 539, 547-549 (1981).

The Ineffective Counsel Claim

After the state habeas hearing, the state habeas judge recommended the granting of relief upon Williams' allegation that trial counsel were ineffective in failing to present additional mitigating evidence at sentencing.[1] The circuit court found that defense counsel failed to investigate and present Williams' juvenile commitment records from Beaumont Correctional Center and statements from Williams' siblings that described conditions in the Williams' household when he was a child; the possible testimony of Williams' wife, 11-year-old daughter, and friend, Bruce Elliott; evidence of Williams' borderline mental retardation; and evidence of Williams' good conduct while incarcerated. (JA 1036, 1059-1060).[2]

The Beaumont records consisted of 47 pages of documents concerning Williams' incarceration as a juvenile. (JA 705-748). Williams was committed to a juvenile institution for the first time when he was 11-years-old, for aiding and abetting larceny. He was committed again when he was 12 for making a false fire alarm. (JA 723). In 1971, when he was 15, he was committed for three counts of breaking and entering, and he remained incarcerated until he reached the mandatory release age of 21. (JA 724-726, 731).

The records also included a November 1967 juvenile court report concerning Williams' home life. (JA 718-723). The report described a 1957 intervention by authorities after the

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[1] Throughout his petition, Williams relies on the state habeas judge's mere recommendation. The Virginia Supreme Court, however, correctly concluded that the judge's recommendation erroneously was based upon a per se rule of prejudice, see Williams v. Warden, 487 S.E.2d at 200, which clearly is erroneous under this Court's precedents. See Burger v. Kemp, 403 U.S. 776 (1987); Strickland v. Washington, 466 U.S. at 691-692.

[2] References are to the Joint Appendix prepared for the appeal in the Fourth Circuit. A copy of the Joint Appendix has been lodged with the Court.

Williams children were discovered in their home unclothed, unfed, and unsupervised. Williams then was one-year-old. The Williams children were removed from their parents' custody from 1957 to 1959. (JA 718-719).

The 1967 report described the positive changes in Williams' family, noting that Williams' father had given up excessive drinking and bootlegging. (JA 721). Williams' father was described as: "regularly employed," "cooperative with the Court," "shows a genuine interest in his children," and "shows great concern over his family when they get involved in trouble." Mrs. Williams was noted as having "a great love and interest in her children but due to her limitations she seems to be ineffectual in disciplining them." (JA 721). The report described Terry Williams as one who:

> Never actually responds to any conversation or seems to understand right from wrong to any great degree. His parents always try to be cooperative and they say that they try to keep close touch on Terry but he just seems to slip away and go about the neighborhood doing as he pleases.

(JA 720). The 1967 report also described Terry Williams' then current criminal activities: an incident involving property damage at age 8, bicycle theft in 1966, and disorderly conduct, malicious damage, and larceny charges in 1967. (JA 719-720).

Four of Williams' siblings submitted affidavits in 1988 which stated that Terry Williams' parents drank excessively and fought, that Williams' father disciplined him with beatings and that Williams was "never a violent person." (JA 895-904). Williams' daughter, Jennie, described Williams as "a good daddy" in her affidavit and stated that she would have testified to that effect at Williams' trial in 1986. (JA 890). At the time of trial, Jennie Williams was just 11 years old and her father had been in prison for all but three years of her life. Williams' ex-wife submitted an

affidavit that described the three years (1973-1976) she had been married to Williams. (JA 892-894).

Finally, the circuit court noted an affidavit from Bruce Elliott, a C.P.A. in Harrisonburg, Virginia, who met Terry Williams in 1978 while Williams was incarcerated for his 1976 robbery conviction. Elliott's affidavit indicated that he was involved in a local church's prison ministry program and saw Williams frequently. (JA 882-883). Elliott stayed in contact with Williams after he was transferred to a different correctional unit, and while Williams was on parole. Elliott's affidavit stated that he would have testified that Williams was proud of his accomplishments in prison, and that he was mild mannered, not aggressive. (JA 883, 885). [3]

At Williams' 1986 sentencing, the prosecution presented evidence of Williams adult convictions for robbery and of other recent violent criminal conduct. ***Within several months of the Stone murder, Williams had stabbed an elderly man after starting a diversionary fire in his home and brutally beat an elderly woman, leaving her in a "vegetative state."*** The Commonwealth did not present any evidence concerning Williams' extensive juvenile record.

Williams' sentencing case in 1986 presented two character witnesses, Williams' mother, and a psychiatrist. Williams' mother did not mention any of the alleged incidents of his childhood subsequently raised in his habeas action, but testified generally that Williams was a "nice boy at

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[3] In regard to Williams' other ineffective counsel claims, the circuit court found that counsel competently handled the testimony of two mental health experts, Drs. Centor and Ryans, and their opinions that Williams was dangerous. The state court also found "no prejudice" in regard to the psychiatric testimony of future dangerousness because the evidence of Williams' prior criminal activity alone overwhelmingly supported the future dangerousness finding. (JA 1041, 1048). The state court also found that counsel followed a reasonable strategy in argument at sentencing, by stressing Williams' remorse and cooperation with the police. (JA 1094).

home." (JA 199). Both character witnesses attempted to portray Williams as non-violent, but were subjected to extremely damaging cross-examination by the prosecutor based on Williams' violent criminal history. (JA 191-192, 197-198). The psychiatrist could offer only that Williams claimed to have unloaded his pistol prior to committing a robbery in 1976. (JA 184-185).

Without reaching the issue of counsel's allegedly deficient performance, the Virginia Supreme Court rejected the state habeas judge's recommendation that Williams be granted relief because Williams clearly failed to demonstrate Strickland prejudice:

> The jury was presented with the murder of an intoxicated, elderly person in his own bedroom committed by a 31-year-old man. The murder weapon was a tool customarily used to dig stumps. At the time, defendant had been out of the penitentiary for only seven months, released on parole for convictions of burglary and grand larceny.
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> The accused was in the midst of a crime spree, preying upon defenseless individuals. Following commission of these crimes of murder and robbery in November 1985, the defendant savagely beat an elderly woman about her head in March 1986, leaving her lying in the street unconscious with multiple injuries. At the time of trial, she was in a nursing home "vegetating" from a brain injury with no hope of recovery.
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> Upon being questioned in April and May 1986 about the November 1985 crimes, the defendant admitted to the recent theft of two motor vehicles. He also admitted setting fire to clothes on the porch of a residence late one night in December 1985, luring the occupant outside, and stabbing him with a knife in order to rob him. The accused later was convicted of the vehicle thefts and, at the time of trial for the present crimes, had been convicted of an arson that took place in the city jail.
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> While held in jail on the present offenses, he related to a police officer "that he wanted to just choke some of the guys in the jail cell, and one day some had gone to the library and one guy was laying on the bed, and he got the urge to just go over and choke him. Another time he was playing cards and he thought he could

just hit someone and break that person's jaw without him ever knowing what hit him."

The jury also heard that defendant had served time in the penitentiary for an armed robbery committed when he was about 20 years old. The jury did not know of 14 criminal offenses committed by defendant from 1966 to 1975.

Drawing on Strickland [v. Washington, 466 U.S. 668 (1984)], we hold that, even assuming the challenged conduct of counsel was unreasonable, the prisoner "suffered insufficient prejudice to warrant setting aside his death sentence," 466 U.S. at 698-99, the predicate of which was that there is a probability that he would commit criminal acts of violence which would constitute a continuing serious threat to society. The mitigation evidence that the prisoner says, in retrospect, his trial counsel should have discovered and offered ***barely would have altered the profile of this defendant that was presented to the jury. At most, this evidence would have shown that numerous people, mostly relatives, thought that defendant was nonviolent and could cope very well in a structured environment. Of course, those assumptions are belied by the four-month crime spree beginning with the present crimes and by the defendant's current attitude while in jail toward other inmates***.

What the Supreme Court said in Strickland applies with full force here: "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." 466 U.S. at 700. Indeed, disclosure of the defendant's juvenile history might even have been harmful to his case.

Williams v. Warden, 487 S.E.2d at 199 (emphasis added).

REASONS WHY THE WRIT AND A STAY SHOULD BE DENIED

I. THE FOURTH CIRCUIT'S ROUTINE, FACT-BOUND APPLICATION OF STRICKLAND V. WASHINGTON PROVIDES NO COMPELLING REASON FOR CERTIORARI REVIEW OR A STAY OF EXECUTION.

The Fourth Circuit applied Strickland v. Washington, 466 U.S. 668 (1984), and Lockhart v. Fretwell, 506 U.S. 364 (1993) to the particular facts of Williams' case and agreed with the Virginia Supreme Court that he could not demonstrate that he was prejudiced by trial counsel's alleged errors at the 1986 sentencing proceeding. Williams has dissected the Virginia Supreme Court's and Fourth Circuit's opinions and raises three challenges. He asserts that references to Lockhart in the state court opinion suggest that the Virginia Supreme Court applied an erroneous "windfall" prejudice analysis which the Fourth Circuit erroneously found to be reasonable; that the Fourth Circuit instead should have applied a "one juror" standard of prejudice that is more relaxed than the Strickland standard; and, that the application of Strickland by the state court and Fourth Circuit improperly involved a "weighing state" analysis in a "non-weighing" state.

Williams' contentions are simply wrong and provide no compelling reasons for certiorari review. See U.S.S.Ct. Rule 10. The Fourth Circuit conducted a thorough review of the factual basis of Williams' ineffective counsel claim, concluded under § 2254(d) that the Virginia Supreme Court reasonably applied this Court's precedents in rejecting Williams' claim, and independently found that Williams could not demonstrate prejudice. These fact-specific applications of Strickland v. Washington and Lockhart v. Fretwell present no compelling reasons for certiorari review.

A. The Fourth Circuit correctly upheld the Virginia Supreme Court's determination that a showing of Strickland "prejudice" requires a showing that the sentencing proceeding was unfair.

Williams contends that the Fourth Circuit improperly concurred in the Virginia Supreme Court's reliance upon Lockhart v. Fretwell in concluding that Williams had not demonstrated Strickland prejudice. In Lockhart, this Court held that a defendant seeking to show Strickland prejudice must demonstrate that the proceeding was rendered unreliable or fundamentally unfair. The prisoner in that case had shown that his trial counsel had failed to make a motion which would have succeeded under the law as it existed at the time of trial but which subsequently was overruled. The Court held that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." Lockhart, 506 U.S. at 369.

Williams asserts that the Court of Appeals should have ruled the state court's application of Strickland ***and*** Lockhart was unreasonable because Lockhart is distinguishable on its facts from his case. According to Williams, Lockhart is applicable only when the defendant is asserting a prior right that the law no longer recognizes. These arguments, however, are irrelevant.

The Virginia Supreme Court's reference to Lockhart does not even remotely suggest that the state court somehow agreed with Williams' contention that a different outcome at sentencing was reasonably probable, or that the state court considered such a result a "windfall." Instead, the Virginia Supreme Court clearly stated its conclusion that Williams had failed to meet the Strickland standard:

> "[T]he prisoner's assertions about the potential effects of the omitted proof do not establish a "reasonable probability" that the

> result of the proceeding would have been different, nor any probability sufficient to undermine the outcome."

Williams v. Warden, 487 S.E.2d at 199-200. The Fourth Circuit also correctly stated and applied the Strickland standard:

> If Williams is able to demonstrate that his trial counsel's performances were objectively unreasonable, he must then "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Williams v. Taylor, 163 F.3d at 866. Thus, Williams' assertion that the Fourth Circuit (and the Virginia Supreme Court) were able to deny relief only by "altering" the Strickland standard simply is belied by those courts' written opinions.

As Chief Justice Rehnquist's majority opinion makes clear, Lockhart merely applied the rule of Strickland, which required that counsel's errors be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Lockhart, 506 U.S. at 369, quoting Strickland, 466 U.S. at 687. Strickland itself concludes with the statement that the prisoner "made no showing that the justice of his sentence was rendered unreliable," and that his "sentencing proceeding was not fundamentally unfair." Strickland, 466 U.S. at 700. Thus, the Fourth Circuit rightly concluded that Lockhart's holding that a prisoner must demonstrate that counsel's errors rendered his trial's result unreliable or the proceedings fundamentally unfair, is merely a reiteration of Strickland prejudice, not an alteration of the Strickland standard. Williams v. Taylor, 163 F.3d at 869.

The Fourth Circuit thus correctly concluded that the state court reasonably applied "clearly established federal law, as determined by the Supreme Court of the United States." 28

U.S.C. § 2254(d)(1). The state court clearly applied Strickland in finding that Williams had not established "a 'reasonable probability' that the result of the [sentencing] proceeding would have been different," and Lockhart in finding that the sentencing proceeding "was not fundamentally unfair or unreasonable."[4] See Williams v. Warden, 487 S.E.2d at 199.

The fact-specific application of Strickland and Lockhart by the Fourth Circuit clearly presents no issue warranting the grant of certiorari or a stay of execution.

B. The Fourth Circuit correctly rejected Williams' erroneous "one juror" prejudice analysis.

Virginia law provides that the trial court will impose a life sentence in a capital case if the jury is unable to agree unanimously on a sentence. Va. Code § 19.2-264(E). Williams assumes that one juror is "easier to persuade" than twelve, and from that premise argues that his burden under Strickland to show a reasonable probability of a different sentencing outcome should be satisfied if he merely shows that one juror probably would have voted for a life sentence if trial counsel had presented all of Williams' mitigation evidence. This argument, however, cannot warrant the granting of certiorari.

The Fourth Circuit correctly upheld the Virginia Supreme Court's finding of no Strickland prejudice, and rejected Williams' claim to a less rigorous standard:

> A court may not assume that one juror may be more likely swayed by mitigating evidence than his fellow jurors. See Strickland, 466 U.S. at 695 (noting that a finding of prejudice does not "depend upon the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency"). Rather, the

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[4] As the Fourth Circuit noted, the Virginia Supreme Court's reliance on Lockhart in addition to Strickland is consistent with the application of Lockhart by the various courts of appeals. Williams v. Taylor, 163 F.3d at 869.

> Strickland prejudice standard assumes twelve reasonable, conscientious, and impartial jurors. Thus, that one hypothetical juror may be swayed by a particular piece of evidence is insufficient to establish prejudice.

Williams v. Taylor, 163 F.3d at 568. The only "juror" that may be considered in the Strickland prejudice context, therefore, is the generic reasonable, conscientious, and impartial juror who reasonably applies the law to the facts of the case, ***not*** "one juror" the prisoner arbitrarily assumes has a propensity to view his case more favorably than his colleagues. See Strickland, 466 U.S. at 695 ("An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, 'nullification,' and the like.").

The rule Williams advocates would constitute a significant expansion and softening of the stringent Strickland prejudice standard.[5] Clearly, Strickland itself cannot support such a rule.[6] See 466 U.S. at 695 (prejudice inquiry should not depend upon a decisionmaker's "unusual propensities toward harshness or leniency"). Williams is not entitled to the creation of such a new rule in this collateral proceeding. See Teague v. Lane, 489 U.S. 288 (1989); Stewart

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[5] The rule Williams advocates cannot be limited only to Virginia, or to only where a life sentence is imposed if a jury cannot agree on a sentence. On the contrary, Williams' purported rule would require the assessment of the likelihood that his hypothetical "one juror" can "hold-out" and preclude or alter a finding of guilt or sentence in any criminal trial where jury unanimity is required.

[6] Williams asserts that the Fourth Circuit's decision on this point is contrary to authority in other circuits. It is not at all clear that any of the cases upon which petitioner relies considered the "one juror" approach to be any less stringent than the Strickland standard, or even that such an approach resulted in a different outcome than what a Strickland analysis would have reached. Even if hypothetically there were other circuits which were failing to apply Strickland correctly, such decisions could not constitute a "conflict" warranting a grant of certiorari ***in Williams' case***. There simply is no question that the Fourth Circuit correctly understood and applied the Strickland prejudice standard in Williams' case.

v. LaGrand, 1999 U.S. LEXIS 1715, No. A-735 (March 3, 1999) (a holding that Eighth Amendment claims cannot be waived in capital cases would constitute impermissible "new rule").

C. *Neither the Fourth Circuit nor the Virginia Supreme Court engaged in an improper "weighing" analysis.*

Williams' assertion that the Strickland standard applies only in "weighing" States presents no compelling reason for certiorari review. Summarizing its rejection of Williams' ineffective assistance of counsel claims, the Virginia Supreme Court concluded:

> What the Supreme Court said in Strickland applies with full force here: "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstance and hence the sentence imposed."

Williams v. Warden, 487 S.E.2d at 200. Because Strickland v. Washington involved a Florida prisoner and, because Florida is a "weighing" State, Williams argues that Strickland's reference to aggravating evidence "outweighing" mitigating evidence should not apply in cases from Virginia which is a "non-weighing" State.[7]

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[7] For purposes of reviewing death sentences supported in part by an invalid aggravating factor, this Court has recognized a distinction between state death sentencing schemes which require a jury to weigh aggravating circumstances against mitigating circumstances and those that do not. See Zant v. Stephens, 462 U.S. 862 (1983). The term "weighing state," since Zant, has become a term of art in capital case jurisprudence, providing a short-form method of distinguishing state capital sentencing regimes. See Clemons v. Mississippi, 494 U.S. 738, 752 (1990); Espinosa v. Florida, 505 U.S. 1079, 1082 (1992); Stringer v. Black, 503 U.S. 222, 229 (1992); Tuilaepa v. California, 512 U.S. 967, 986 (1994); Parker v. Dugger, 498 U.S. 308, 318 (1991); Lambrix v. Singletary, 520 U.S. 518 (1997). Florida is a "weighing state," see Parker v. Dugger, 498 U.S. at 318, and Virginia is not. See Tuggle v. Netherland, 79 F.3d 1386, 1389 (4th Cir.), cert. denied, 519 U.S. 894 (1996).

Williams' argument is frivolous.[8] Strickland contains no reference to Florida being a "weighing state" or any suggestion that the opinion was written to apply only to Florida, or other "weighing states." It is not uncommon for a reviewing court to use the concept of weight or balance in assessing prejudice in a Strickland context without regard to the separate and independent term of art describing a State's death penalty regime. In Strickland, the Court alternatively stated that the question is whether there is a reasonable probability that "the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695. The Fourth Circuit noted that it too has used the identical quotation from Strickland in rejecting a South Carolina prisoner's claim of prejudice in a capital sentencing, and South Carolina, like Virginia, is not a "weighing" State. Williams v. Taylor, 163 F.3d at 870.

Neither the Virginia Supreme Court's accurate reiteration of the Strickland standard, nor the Fourth Circuit's concurrence in the state court's rejection of Williams' ineffective counsel claim, warrants this Court's review.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE FOURTH CIRCUIT'S STRAIGHTFORWARD APPLICATION OF SECTION 2254(d), WHERE THE FOURTH CIRCUIT INDEPENDENTLY FOUND THAT WILLIAMS' CLAIM WAS WITHOUT MERIT.

The Fourth Circuit's application of § 2254(d) does not warrant certiorari review. Williams argues that the circuit courts are "deeply divided" in interpreting 28 U.S.C. § 2254(d), and that the Fourth Circuit's view of the statute is unconstitutional. There is, however, no valid

[8] Williams never asserted this argument in state court or in the district court, but concocted it for the first time in his appeal to the Fourth Circuit.

claim of a relevant conflict among the circuits, and the Fourth Circuit's construction of the statute in Williams' case presents no valid basis for review by this Court.

First, Williams' argument about the Fourth Circuit's interpretation of § 2254(d) is a moot point because his allegations of ineffective trial counsel were considered de novo by the Fourth Circuit under the Strickland v. Washington standard and found insufficient to warrant relief. The Fourth Circuit expressly agreed with the Virginia Supreme Court's conclusion that Williams could not demonstrate Strickland prejudice. Williams v. Taylor, 163 F.3d at 868 ("Like the Virginia Supreme Court, we readily conclude that Williams was not prejudiced in any way by trial counsel's actions"). Thus, the Fourth Circuit's alternative ruling that the state court's rejection of Williams' claim was "reasonable" within the meaning of § 2254(d) cannot serve as a basis for granting certiorari.

In Green v. French, 143 F.3d 865 (4th Cir. 1998), cert. denied, 119 S.Ct. 844 (1999),[9] the Fourth Circuit stated the standard for review under § 2254(d):

> If a state court decision is in square conflict with a precedent (supreme court) which is controlling as to law and fact, then the writ of habeas corpus should issue; if no such controlling decision exists, the writ should issue only if the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant supreme court precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts. In other words, habeas relief is authorized only when the state courts have decided

[9] The petitioner in Green v. French presented essentially the same argument in his petition for certiorari to this Court and the Court denied review. Green v. French, No. 98-7096, Petition for Writ of Certiorari at 15-22.

> the question by interpreting or applying the relevant precedent in a manner than reasonable jurists would all agree is unreasonable.

143 F.3d at 870. Williams has failed to demonstrate any "compelling" reason why the Fourth Circuit's articulation of the standard merits review by this Court.

A. "Contrary to"

Williams asserts there is an alleged disagreement between the Fourth and First Circuit regarding the meaning of § 2254(d)'s reference to state decisions that are "contrary to" this Court's precedents. However, the meaning of "contrary to" in § 2254(d) never has been an issue in this case and is no part of the decision below. Williams never has asserted before now that the "contrary to" clause had any application to his claims, much less that it should be interpreted in a specific fashion. He did not suggest in the court below, and he still has not argued here, that the Virginia Supreme Court's decision in his case was "contrary to" established precedent of this Court. This Court obviously should not grant certiorari to resolve an alleged "conflict" between circuits that is entirely irrelevant to the case.

The alleged conflict Williams sees between the Fourth and First Circuits, moreover, is non-existent. The Fourth Circuit has concluded that a state court decision is

> "contrary to" precedent only when, either through a decision of pure law or the application of law to facts indistinguishable in any material way from those on the basis of which the precedent was decided, that decision reaches a legal conclusion or a result opposite to and irreconcilable with that reached in the precedent that addresses the identical issue.

Green, 143 F.3d at 870. The First Circuit, in O'Brien v. Dubois, 145 F.3d 16 (1st Cir. 1998), concluded that the "contrary to" review asks

> whether a Supreme Court rule – by virtue of its factual similarity (though not necessarily identically) or its distillation of general

> federal law precepts into a channeled mode of analysis specifically intended for application to variant factual situations – can fairly be said to require a particular result in a particular case.

O'Brien, 145 F.3d at 25. Far from suggesting a "significant divergence of analysis," these decisions represent entirely consistent approaches to § 2254(d)'s "contrary to" clause.

B. No split

Williams' assertion of a split among the circuits is simply incorrect. Those circuits that have addressed the issue of the appropriate standard of review all agree that strong deference is required to the state court decision on the prisoner's claim.

Like the Fourth Circuit, the Fifth and Eleventh Circuits also have held that habeas relief may be granted only if the state court decision is so clearly incorrect that it would not be debatable among reasonable jurists. Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir. 1996), cert. denied, 520 U.S. 1107 (1997); Neelley v. Nagle, 138 F.3d 917, 924 (11th Cir. 1998) (adopting Drinkard standard), cert. denied, 119 S.Ct. 871 (1999). The First Circuit has held that "for the writ to issue, the state court decision must be so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." O'Brien v. Dubois, 145 F.3d at 25 n.7. The Seventh Circuit has stated that the reasonableness of the state court's application of precedent turns on "whether the determination is at least minimally consistent with the facts and circumstances of the case." Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir.), cert. denied, 118 S.Ct. 72 (1997). The Sixth Circuit has adopted the Drinkard statement of "debatable among reasonable jurists," see Herbert v. Billy, 160 F.3d 1131 (6th Cir. 1998), ***and*** O'Brien's description of a "universe of plausible, credible outcomes." See Nevers v. Killinger, ___ F.3d ___, 1999 U.S. App. LEXIS 3126 (6th Cir. 3/1/99).

Thus, every circuit court decision that Williams relies upon agrees that § 2254(d) has abrogated de novo review. Specifically, a federal court no longer may grant habeas relief "merely because that court disagrees with the state court's decision, or because, left to its own devices, it would have reached a different result." O'Brien, 145 F.3d at 25. See also Drinkard, 97 F.3d at 768 ("'unreasonable application standard of review of a state court decision just mean more than that a federal court may grant habeas relief based on its simply disagreement with the state court decision"); Hennon, 109 F.3d at 334 ("The fact that we might disagree with the state court's determination...would not carry the day...."); Neelley, 138 F.3d at 924 ("The mere fact that a district court disagrees with a state court does not render that state court's decision 'unreasonable.'").

The concept of respect for reasonable decisions by state courts is hardly novel. The Teague "new rule" doctrine similarly "validates reasonable, good-faith interpretations of existing precedents made by state courts." Butler v. McKellar, 494 U.S. 407, 414 (1990).

> Reasonableness, in this as in many other context, is an objective standard. Stringer v. Black, 503 U.S. 222, 237 (1992). Accordingly, we will not disturb a final state conviction or sentence unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court.

O'Dell v. Netherland, 119 S.Ct. 1969, 1973 (1997). Objective reasonableness is determined by asking whether the rule the prisoner seeks was "susceptible to debate among reasonable minds." Id.; see Butler, 494 U.S. at 415; Sawyer v. Smith, 497 U.S. 227, 236-237 (1990).

Not surprisingly, the various courts of appeals have interpreted § 2254(d)'s "unreasonable application" language in conformity with the "objective reasonableness" standard of the "new

rule" analysis. See O'Brien, 145 F.3d at 25 (tying "universe of plausible, credible outcomes" to Teague rule to uphold "reasonable good faith interpretations of existing precedents"); Drinkard, 97 F.3d at 769 (habeas relief available only if sate decision so incorrect that it would not be debatable among reasonable jurists); Neelley, 138 F.3d at 923-924 and n.4 (clearly established and unreasonable application provisions are "akin to the Teague doctrine"); Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996), rev'd on other grounds, 117 S.Ct. 2059 (1997) (purpose of "unreasonable application of" clause to "validate[ ] reasonable, good-faith interpretations of existing precedents made by state courts").

Williams' hyperbolic characterization of the Fourth Circuit's construction of § 2254(d) – he concludes that it requires the denial of relief in every case – simply does not present an issue warranting certiorari review. The Court of Appeals' conclusion that the Virginia Supreme Court's decision was not an "unreasonable application" of this Court's precedents clearly is correct under any existing interpretation of § 2254(d) existing in the circuits. Indeed, Williams does not even assert, nor could he, that he would be entitled to relief under any of the interpretations of § 2254(d) which any other circuit has adopted.

Finally, Williams' contention that the Fourth Circuit's construction of § 2254(d) offends the Constitution is unfounded. In Green, the Fourth Circuit noted:

> [A]mended section 2254(d) does not limit any inferior federal court's independent interpretive authority to determine the meaning of federal law in any Article III case or controversy. Under the AEDPA, we are free, if we choose, to decide whether a habeas petitioner's conviction and sentence violate any constitutional rights. Section 2254(d) only places an additional restriction upon the scope of the habeas remedy in certain circumstances.

Green, 143 F.3d at 874-875. See also Lindh, 96 F.3d at 872. This Court has made it clear that "judgments about the proper scope of the writ [of habeas corpus] are "normally for Congress to make." Felker v. Turpin, 518 U.S. 651, 664 (1996) (quoting Lonchar v. Thomas, 517 U.S. 314, 323 (1996). The Fourth Circuit's interpretation of § 2254(d) is entirely consistent with Felker and presents no issue warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari and the application for a stay of execution should be denied.

Respectfully submitted,

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No. 98-8384

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

TERRY WILLIAMS,

Petitioner-Appellee,

v.

JOHN TAYLOR, Warden,
Sussex 1 State Prison,

Respondent-Appellant.

On Petition for a Writ of Certiorari to the
Court of Appeals for the Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND STAY OF EXECUTION

I. INTRODUCTION

On March 5, Terry Williams filed a Petition for Certiorari with this Court seeking review of the Fourth Circuit's decision reversing the decision of the federal district court that vacated Williams's sentence of death and ordered a new sentencing hearing. Contrary to the Commonwealth's assertion in its Opposition to the Petition, the basis for Williams's Petition is eminently certworthy.

First, Williams urges the Court to grant certiorari to correct the Fourth Circuit's skewed application of Strickland v. Washington, 466 U.S. 668 (1984), which (a) incorporated

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a "windfall" analysis for determining prejudice in "non-windfall" cases; (b) precluded a showing of prejudice even if a reasonable, conscientious and impartial juror would have been swayed by the omitted evidence to vote for life; and (c) adopted a rule that prejudice can never be shown if aggravating circumstances outweigh mitigating circumstances even if the original sentence was statutorily barred from "weighing" the evidence in the first instance. Because these systemic errors with the dire consequences they portend for the numerous capital habeas litigants who pass through the appellate court's gate conflict with this Court's settled jurisprudence, certiorari is imperative to provide the necessary correction.

Second, Williams urges this Court to grant certiorari to settle the unreconcilable split in the circuit courts over the appropriate standard of review under the Anti-Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. §2254(d)(1). With respect to both the "contrary to" and "unreasonable application of" prongs of section 2254(d)(1), which defines the parameters of review for lower state court conclusions of law, the Fourth Circuit stands at the extreme end of an increasingly broad divide among the circuits. The "interpretive conundrum of the statute," as recognized even by the Fourth Circuit[1] has reached fever pitch. Without this Court's articulation of a clear and universally applicable rule of law, the imposition of the death penalty will assume a freakishness that can ultimately have but one result -- that is, to render the death penalty unconstitutional under the Eighth Amendment to the U.S. Constitution.[2]

---

[1]Green v. French, 143 F. 3d 865, 870 (4th Cir. 1998).

[2]With respect to the AEDPA, the issues raised in Williams's Petition are issues very similar to those raised in the petitions for certiorari filed with this Court in Johnson v. Moore, 164 F.3d 624, 1998 WL 708691 (4th Cir. 1998) (unpub. op.), petition for cert. filed (U.S. Jan. 19, 1999) (No. 98-7820) and Swann v. Taylor, No. 98-20, 1999 WL 86690 (4th Cir. Feb. 18, 1999), petition for cert. filed (U.S. Mar. 23, 1999). Both cases are currently pending for resolution.

II. THE COMMONWEALTH'S OPPOSITION FAILS TO UNDERCUT THE COMPELLING REASONS WHY CERTIORARI SHOULD BE GRANTED IN THIS CASE

A. The AEDPA Claims Are Neither Moot Nor Meritless

1. The Commonwealth's Claim of Mootness Is Frivolous

The Commonwealth claims that "Williams' argument about the Fourth Circuit's interpretation of §2254(d) is a moot point because his allegations of ineffective trial counsel were considered de novo by the Fourth Circuit under the Strickland v. Washington standard and found insufficient to warrant relief." (Commonwealth's Brief in Opposition to Petition for Writ of Certiorari ("Brief in Opposition") at 17.) Because the Fourth Circuit "expressly agreed" with the Virginia Supreme Court, the Commonwealth maintains, the court's conclusion that the supreme court's rejection of the writ was reasonable is merely an "alternative ruling" that "cannot serve as a basis for granting certiorari." (Brief in Opposition at 17.)

This proposition is absurd on its face and, notably, unencumbered by citation to legal authority. As an initial matter, there is absolutely no reference in the Fourth Circuit's decision to any "alternative ruling" or any hint whatsoever that its decision is free-floating and independent of the AEDPA's standard of review. Moreover, were that so, the list of egregious errors made by the Fourth Circuit in the resolution of this case would have grown by one: namely, abandonment of the standard of review dictated by the AEDPA.

The speciousness of this claim is no better seen than in the Commonwealth's contradictory assertion elsewhere in its Opposition that "§2254(d) has abrogated de novo review." (Brief in Opposition at 20 (emphasis added).) Unwittingly exposing the weakness of its mootness claim, even the Commonwealth cannot escape the obvious conclusion that the standard of review

of state court decisions granting a writ of habeas corpus is inextricably tied to section 2254(d)(1), and that there is no such thing as "independent" review. In short, while the Commonwealth understandably prefers to avoid a potential and likely determination that the Fourth Circuit's interpretation of that standard is incorrect, its proffered claim of mootness fails utterly to provide that escape hatch.

2. The Commonwealth's Attempt to Gloss Over the Glaring Differences Among the Circuit Courts on the Proper Scope of the AEDPA Is Unavailing

a. Williams's AEDPA Claims Are All Properly Before the Court

The Commonwealth claims that the "contrary to" analysis is not properly before this Court because the Fourth Circuit made no findings with respect to the AEDPA's "contrary to" prong. The record, however, does not support this barren claim. To the contrary, a review of the District Court decision, the Fourth Circuit decision, and the parties' briefs to the Fourth Circuit all reflect a focus on both the "contrary to" and the "unreasonable application of" prongs of the AEDPA, making both proper for this Court's review.

The scope of this case is keyed directly to the District Court's decision granting the writ and vacating Williams's death sentence. Carefully applying the AEDPA's section 2254(d)(1) standard of review, the District Court concluded that the Virginia Supreme Court's decision finding no Strickland prejudice was "contrary to and involved an unreasonable application of clearly established federal law." (App. 1 at 9-10, 14, 30-34).[3]

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[3]"App." references are to the Appendices submitted in support of the Petition for Certiorari which include, among other things, the decision of the District Court ("App. 1") and the recommended findings of fact and conclusions of law of the state circuit court judge in support of a new sentencing hearing ("App. 2").

In response to the Commonwealth's challenge to the District Court's abundantly correct conclusion that he had been denied effective assistance of counsel at his sentencing trial, Williams squarely raised both prongs of the AEDPA's standard of review. Specifically, in defending the District Court's conclusion that the Virginia Supreme Court decision was deeply flawed from the Commonwealth's attack, Williams argued:

> The Warden is wrong on both counts. As shown, the Virginia Supreme Court's opinion was 'contrary to or involved an unreasonable application of clearly-established Federal law,' 28 U.S.C. §2254(d)(1), because it incorporated an inappropriate 'weighing' analysis into Strickland's prejudice prong and replaced Strickland's test with the more demanding 'windfall' analysis of Lockhart v. Fretwell. See, e.g., Neelley v. Nagle, 138 F.3d 917 (11th Cir. 1998) (decision 'contrary to' clearly-established Supreme Court law when state court fails to apply correct legal standard).

(See Answering and Opening Brief of Appellee/Cross-Appellant at 32; see also id. at 59.) The Fourth Circuit's response that "[t]he Virginia Supreme Court's conclusion that Williams's trial counsel were not ineffective during the sentencing phase of Williams's trial was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent," Williams v. Taylor, 163 F.3d 860, 863 (4th Cir. 1998), thus clearly reflected the debate as presented to the Court.[4] Having pressed both prongs into service in the Fourth Circuit, it comes with poor grace

---

[4]Indeed, the Fourth Circuit specifically noted that the Commonwealth invoked both prongs in challenging the District Court's decision:

> On appeal, the Commonwealth contends that the district court erred in granting Williams federal habeas relief. In particular, the Commonwealth argues that the Virginia Supreme Court's conclusion that Williams's trial counsel were not ineffective was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent.

163 F.3d at 865 (emphasis added).

for the Commonwealth now to disavow its position and, worse, erroneously assert that Williams has somehow defaulted his claim that the Fourth Circuit's interpretation of the "contrary to" prong defies the AEDPA, logic and Article III of the United States Constitution.

b. Courts Are Hopelessly Divided
Over the Proper Interpretation of the AEDPA

The Commonwealth's attempt to cleanse the judicial landscape of any split in the federal circuits is but a transparent effort to avoid the day of reckoning over the issue that has so divided the circuit courts: the appropriate reach of the federal courts in reviewing habeas corpus claims in light of 28 U.S.C. §2254(d)(1).

As an initial matter, to assert as the Commonwealth does (Brief in Opposition at 18), with respect to the "contrary to" prong, that the "alleged conflict" between the Fourth and the First Circuits is "non-existent" is overreaching of the worst order. Indeed, the very quotations relied on by the Commonwealth from Green, supra, and O'Brien v. Dubois, 145 F.3d 16 (1st Cir. 1998), do not deflate the conflict but, rather, graphically illustrate it. Thus, contrary to Green, which requires "facts indistinguishable in any material way," the First Circuit in O'Brien looks only for "factual similarity." With respect to the applicable legal principle involved, the Fourth Circuit requires the "identical issue." The First Circuit, on the other hand, looks only for "the distillation of general federal law precepts into a channeled mode of analysis specifically intended for application to variant factual situations." O'Brien, 145 F.3d at 25 (emphasis added).

Likewise, the Commonwealth's effort to wash away the split with respect to the "unreasonable application of" prong with the bland truism that all courts "agree that strong deference is required to the state court decision on the prisoner's claim" (Brief in Opposition at

19) purposely and disingenuously understates the narrowness of the Fourth Circuit's interpretation. Indeed, to declare the Fourth Circuit's constricted interpretation merely the prosaic "concept of respect for reasonable decisions by state courts"[5] so minimizes the draconian sweep of the Fourth Circuit's interpretation that reasonable minds must seriously question the Commonwealth's analysis of any of the cases it seeks to distinguish in its Opposition to this Court.

Contrary to the Commonwealth's assertion, the circuits are, indeed, deeply divided over the proper interpretation of section 2254(d)(1), that division best reflected by the position of the Fourth, Fifth and Eleventh Circuits, on the one hand, and the First and the Seventh, on the other hand. Try as the Commonwealth might, there is simply no sound basis upon which to reconcile these diametrically opposed positions. Thus, the conclusion of the Fourth and the Fifth Circuit that a state court decision is impervious from collateral attack unless "state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable"[6] cannot be squared with the First Circuit's view, as expressed in O'Brien, 145 F.3d at 16, 25, that the appropriate test is "objective reasonableness" and that to the "extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of the state court's treatment of the contested issue."

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[5]Brief in Opposition at 20.

[6]Williams v. Taylor, 163 F.3d at 865, quoting Green, 143 F.3d at 870; see also Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir. 1996), cert. denied, 520 U.S. 1107 (1997).

Applying that dichotomy of opinion to this particular case graphically illustrates the key difference of judicial opinion on this issue. Under the Fourth Circuit's "all reasonable jurists" analysis, Williams can never prevail because, in his case -- as evidenced by the divergence of views expressed by the state circuit court and the District Court, on the one hand and the Virginia Supreme Court and the Fourth Circuit, on the other hand -- all reasonable jurists do not agree on the outcome of this case -- *ergo*, Williams cannot prevail. Under the First Circuit's approach, however, reference to "inferior federal court" decisions that are "factually similar" to this case demonstrates that Danville Circuit Court Judge Ingram's conclusion that Williams had not received a fair sentencing hearing due to his trial counsel's ineffectiveness[7] was abundantly reasonable and thus Williams's death sentence should be vacated and a new sentencing trial ordered.[8]

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[7]The Commonwealth attempts to diminish the weight of Danville Circuit Court Judge James Ingram's well-reasoned and well-founded decision in this case by arguing that he wrongly relied on a per se prejudice analysis. (Brief in Opposition at 5 n.1.) The Virginia Supreme Court's erroneous conclusion in this regard, which the Commonwealth advances here, is borne of its own flawed interpretation of Strickland. Moreover, a plain reading of Judge Ingram's decision reflect no variation from well-recognized and accepted Strickland principles and, if anything, emphasized his recognition of the burden Williams faced in meeting the Strickland test. Specifically, he explained that

> it is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. [citation omitted.] The petitioner bears the "highly demanding" and "heavy burden" in establishing actual prejudice. [citations omitted].

(App. 2 at 39 (emphasis added).)

[8]Williams made this precise argument in his Petition. (See Petition for Certiorari at 35-38.) Accordingly, the Commonwealth's assertion (Brief in Opposition at 21) that Williams "does not even assert, nor could he, that he would be entitled to relief under any of the interpretations of §2254(d)" is thus plainly incorrect.

The Commonwealth's effort to massage the glaring differences in language and result of these two bodies of opinion by reference to the Sixth Circuit's recent decision in Nevers v. Killinger, No. 98-1039, ___ F.3d ___, 1999 WL 97993 (6th Cir. Mar. 1, 1999), which sought to meld the Fourth and Fifth Circuits' test with that of the First Circuit, is unavailing. Rather than resolve the conflict among the circuits, Nevers only demonstrates the confusion and, worse, adds to it. Indeed, although Judge Bright concurred in the result, he disagreed with the majority's interpretation of the "unreasonable application of" prong. In his view, the "amalgamation of the two standards [of the First and Fifth Circuits] creates too rigid a bar to proper relief" and "approaches a suspension of the Writ of Habeas Corpus." Nevers, 1999 WL 97993 at *29.

Finally, the Commonwealth's argument (Brief in Opposition at 21-22) challenging Williams's claim that the Fourth Circuit's interpretation of section 2254(d)(1) offends Article III barely limps to the finish-line. To rely primarily on the Fourth Circuit's decision in Green as support for the proposition that the Fourth Circuit's interpretation does not violate Article III is bootstrapping of the worst order, and cannot be cured merely by citation to Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996), rev'd on other grounds, 521 U.S. 320, (1997), Felker v. Turpin, 518 U.S. 651 (1996) and Lonchar v. Thomas, 517 U.S. 314 (1996).

III. THE *STRICKLAND* CLAIMS

As discussed above, and in the Petition, the Fourth Circuit's exceedingly pinched interpretation of the AEDPA's standard of review of legal determinations is inextricably tied to its incorrect decision in this case. Believing itself required to defer to the Virginia Supreme Court's plainly incorrect legal analysis in this case because, as evidenced by the very

disagreement among the judges in this case, all reasonable jurists did not agree to grant the writ, the Fourth Circuit denied relief. In so doing, the court adopted the errors made the Virginia Supreme Court in analyzing and applying Strickland v. Washington, 466 U.S. 668 (1984), and made more of its own. These errors, as set forth below and as more fully explained in the Petition, are neither "routine" nor merely "fact-bound,"[9] but rather speak to a systemic and recurring dysfunction in the Fourth Circuit's analysis of Strickland prejudice.[10] Because the only means of correction lies with this Court, a grant of certiorari is essential.

A. *Strickland* Prejudice May Not Be Determined by Weighing in a Non-Weighing State

The Commonwealth dismisses as "frivolous"[11] Williams's claim that the Virginia Supreme Court erred by weighing the aggravating evidence against the mitigating evidence to conclude that a sentence of death was appropriate. Notably, the Commonwealth concedes that the Virginia Supreme Court in fact weighed the evidence, but contends that it did so "without regard to the separate and independent term of art describing a State's death penalty regime." (Brief in Opposition at 16.)[12]

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[9]Brief in Opposition at 10, 13; see also Commonwealth's Question Presented No. 1.

[10]The Fourth Circuit's skewed interpretation of Strickland's "prejudice" prong is the focus of Williams's challenge. Notably, neither the Fourth Circuit nor the Virginia Supreme Court disturbed the findings of both the District Court and the state circuit court that Williams's trial counsel's performance was professionally inadequate.

[11]Brief in Opposition at 16.

[12]Significantly, the Commonwealth has shied away from the assertion it pressed before the Fourth Circuit -- and one which the Fourth Circuit unwittingly accepted, Williams, 163 F.3d at 869 -- that this Court did not recognize "weighing" as a term of art until Clemons v. Mississippi, 494 U.S. 738 (1990), six years after Strickland issued. (See Commonwealth's Reply and Answering Brief to the Fourth Circuit at 4.) The Commonwealth now concedes (Brief in Opposition at 15 n.7) that "weighing" assumed an extra-ordinary dimension after Zant v.

Given that the Virginia Supreme Court's decision tracks, *verbatim*, the language of the Florida state "weighing" statute, this assertion is paper-thin. The error of the Virginia Supreme Court is its failure to identify correctly the rule of law Strickland produced: namely, that to demonstrate ineffective assistance of counsel that rises to the level of a constitutional violation, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 6594. The Commonwealth persists in this error and maintains that Strickland's rule of law, which the Commonwealth views as globally applicable, is "whether there is a reasonable probability that 'the balance of aggravating and mitigating circumstances did not warrant death.'" (Brief in Opposition at 16, quoting Strickland, 466 U.S. at 695.) Strickland, however, stands for no such proposition and the Fourth Circuit should not be permitted to relax this Court's standards under the guise of AEDPA deference to state court decisions.[13]

B. *Lockhart* Does Not Provide the Applicable Rule of Law

The Commonwealth maintains that "[t]he Virginia Supreme Court's reference to Lockhart v. Fretwell, 506 U.S. 364 (1993), does not even remotely suggest that the state court somehow agreed with Williams's contention that a different outcome at sentencing was reasonably probable, or that the state court considered such a result a "windfall." (Brief in

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Stephens, 462 U.S. 862 (1983), a case that predates Strickland by one year.

[13]Finally, the Commonwealth's reliance on the Fourth Circuit's assertion, Williams, 163 F.3d at 870, that it has "weighed" aggravating and mitigating circumstances to uphold a sentence of death in previous cases hardly justifies its error in this case. Compare Plath v. Moore, 130 F.3d 595, 602 (4th Cir. 1997), cert. denied, 118 S. Ct. 1854 (1998); Fitzgerald v. Greene, 150 F.3d 357, 368 (4th Cir.), cert. denied, 119 S. Ct. 389 (1998). To the contrary, it underscores the Fourth Circuit's unthinking adherence to a faulty rule of law and the urgent need for this Court to intervene to protect and preserve Strickland from likely future erosion.

Opposition at 11.) Rather, as the Commonwealth sees it, the Virginia Supreme Court's only reference to Lockhart was to support the proposition that failure to focus on "whether the result of the proceeding was fundamentally unfair or unreliable [] is defective." (Brief in Opposition at 11.) This assertion, however, conveniently reads the offending Lockhart language right out of the Virginia Supreme Court's decision.

In setting forth the legal principles it deemed applicable to the resolution of this particular case, the Virginia Supreme Court stated the following:

> "As is obvious, Strickland's demanding standard, although by no means insurmountable, is highly demanding." Kimmelman v. Morrison, 477 U.S. 365, 382 (1986). Accord Strickler, 249 Va. at 128, 452 S.E. 2d at 652. Moreover, "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." Lockhart v. Fretwell, 506 U.S. 364, 369 (1993). And "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant a defendant a windfall to which the law does not entitle him." Id. at 369-370.

Williams v. Warden, 487 S.E. 2d 194, 198 (Va. 1997) (emphasis added). To adopt the Commonwealth's position asserted here, one must presume that the Virginia Supreme Court's quotation of Lockhart's "windfall" language was inadvertent and that its choice of words and legal principles was merely accidental. Given the other serious error in the Virginia Supreme Court's analysis -- namely, the "weighing" of aggravators and mitigators in a non-weighing state -- the Commonwealth cannot reasonably ask that this defect in describing the applicable legal principles also be ignored.[14]

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[14]Hays v. Alabama, 85 F.3d 1492, 1496 (11th Cir. 1996), cert. denied, 520 U.S. 1123 (1997); United States v. Kissick, 69 F.3d 1048 (10th Cir. 1995), and Flamer v. Delaware, 68 F.3d 710 (3d Cir. 1995), cert. denied, 516 U.S. 1088 (1996), upon which the Commonwealth

C. *Strickland*'s "Reasonable Probability" Test Requires an Evaluation of the Effect of the Omitted Mitigation Evidence on One Juror

In granting relief to Williams in this case, the District Court concluded that "there is a reasonable probability that had the jury heard [the omitted mitigation evidence] at least one juror and perhaps all, would have concluded that the death penalty was not warranted." (App. 1 at 30.) The Fourth Circuit rejected this analysis on the ground that Strickland prejudice cannot be shown even if "one hypothetical juror might by swayed by a particular piece of evidence." Williams v. Taylor, 163 F.3d at 868.

The Commonwealth virtually ignores the substantial split in the circuits[15] that exists on this issue. In so doing, the Commonwealth plainly mistakes Williams's argument as urging relief where one juror who "has a propensity to view his case more favorably than his colleagues" might have been swayed by the omitted mitigation evidence. As the Petition makes clear, however, Williams asserts only that the determination of Strickland prejudice cannot be made in a vacuum and that the mathematical probabilities inherent in persuading one juror as opposed to twelve -- which is all that is required under Virginia law -- cannot be ignored. The

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(Brief in Opposition at 13 n.4) and the Fourth Circuit (Williams v. Taylor, 163 F.3d at 869) rely to support the Virginia Supreme Court's analysis in this case do not stand for so broad a proposition. Thus, in all of those cases, the appellate courts relied on Lockhart only for the unremarkable proposition that the ultimate inquiry should be whether the proceeding was "fundamentally fair" and "reliable." Those cases did not, however, rely on a "windfall" analysis, as did the Virginia Supreme Court, and thus provide no support for the Commonwealth's assertion that Lockhart is "merely a reiteration of Strickland prejudice, not an alteration of the Strickland standard (Brief in Opposition at 12.)

[15]As discussed in detail in his Petition (see Petition at 17-22), the Seventh, Ninth and Eleventh Circuits have adopted the District Court's "effect-on-one-juror" approach for evaluating Strickland prejudice.

mathematical probabilities on which Williams bases his argument assume, of course, that any "one juror" is the quintessential reasonable, conscientious and impartial juror. The Commonwealth's argument to the contrary is an obvious "red herring" that may be comfortably ignored by this Court.

IV. CONCLUSION

For the foregoing reasons, the Court should grant certiorari in this case.

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No. 98-8384

In The

Supreme Court of the United States

TERRY WILLIAMS,

Petitioner,

v.

JOHN TAYLOR, Warden, Sussex 1 State Prison,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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Chronology of Relevant Docket Events

07/07/86	Terry Williams indicted for capital murder of Harris Stone
07/08/86	E.L. Motley appointed to represent Terry Williams
08/29/86	Robert J. Smitherman appointed to serve as co-counsel for Williams
09/29-30/86	Capital murder trial including penalty phase – Williams is convicted of capital murder and robbery; jury recommends death sentence
11/19/86	Sentencing hearing – Judge James F. Ingram imposes death sentence and sets execution date.
11/26/86	Notice of appeal filed.
09/04/87	Virginia Supreme Court affirms conviction and death sentence on direct appeal
01/11/88	Supreme Court of the United States denies certiorari on direct appeal (484 U.S. 1020)
08/25/88	Petition for Writ of Habeas Corpus Filed in Circuit Court for City of Danville
04/21/95	Amended Habeas Corpus Petition Filed in the Circuit Court for the City of Danville
06/15-16/95	State habeas hearing before Judge Ingram, Circuit Court for the City of Danville.
02/14/96	Order of Circuit Court for City of Danville transferring case to Virginia Supreme Court
05/06/96	Order of Virginia Supreme Court remanding case to Circuit Court for City of

	Danville for findings of fact and recommended conclusions of law and dismissing certain of Williams's claims
08/15/96	Memorandum Opinion of Circuit Court for City of Danville (Ingram, J.) finding that Williams's counsel was ineffective as to investigation and introduction of mitigation evidence at penalty phase and recommending that Williams be resentenced.
06/06/97	Order of Supreme Court of Virginia Denying Writ with Accompanying Opinion
09/29/97	Order of United States District Court for the Eastern District of Virginia, Alexandria Division (Cacheris, J.) granting petition to proceed *In Forma Pauperis*, appointing counsel to represent Williams, and staying execution.
12/12/97	Petition for Writ of Habeas Corpus filed in United States District Court
04/07/98	Order of United States District Court and Memorandum Opinion Granting Writ and Vacating Death Sentence.
04/21/98	Respondent's Notice of Appeal
05/07/98	Petitioner's Notice of Cross-Appeal
09/24/98	Oral Argument in United States Court of Appeals
12/18/98	Decision of the Court of Appeals for the Fourth Circuit reversing decision of the United States District Court and denying writ
12/31/98	Petition for Rehearing and Suggestion for Rehearing *En Banc*

01/15/99	Order of United States Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing *En Banc*
01/25/99	Mandate of Fourth Circuit issued
02/10/99	Order of Circuit Court for City of Danville Scheduling Execution for April 6, 1999
03/03/99	Order of United States Court of Appeals Denying Motion to Recall the Mandate and to Stay Execution
03/05/99	Motion to Supreme Court of the United States for Leave to Proceed *In Forma Pauperis;* Petition for a Writ of Certiorari; and Application for a Stay of Execution
04/02/99	Stay of execution granted
04/05/99	Writ of certiorari granted

Circuit Court for the City of Danville

[Caption Omitted in Printing]

Transcript of Criminal Trial

Detective T. A. Brown – Direct

* * *

[400] A. "My name is Terry Williams. I am thirty-one years old. I have a seventh grade education. I have been advised of my rights and I have signed a waiver of my rights. I make the following statement of my own free will with no threats or promises having been made to me. I don't remember the date, but it was back before Thanksgiving of last year. I had gone to Dee Dee Stone's house on Henry Street, Dee Dee's father was there. No one else was there except him. He had been drinking a lot. He was on the bed. He asked me if I wanted a drink. I told him, "No." I asked him if I could borrow a couple of dollars and he told me, "No." We started arguing and things started going around in my head. I just wanted to get back at him. I don't know what. He just laid back like he had passed out. He was laying there talking and moaning to himself. I went into the kitchen. I saw the butcher knife. I didn't want to use it. I was looking for something to use. I went into the bathroom and I saw the mattock. I picked up the mattock and I came back into [401] the room where he was at. He was laying on the bed. He was laying on his back. I took the mattock and I hit him on the chest with it. He raised up and was gasping for his breath. He fell over to his side and I hit him in the back with the mattock. He fell back on the bed. I went and put

the mattock back in the bathroom. I came back into the room. I took his wallet from his pocket. He had three dollars in it. I got the three dollars from it. I left him there. He was still gasping for breath. I walked across Main Street bridge. I threw the wallet over the bridge into the river. I then went to the Cabaret. The next day I heard that he had died. Last night I wrote a letter to the Chief of Police about what I had done. I want some help for what I have done. Detective T. A. Brown has read this statement back to me and it's true and correct to the best of my knowledge. Signed, Terry Williams."

Q. All right, so in this statement he says that he didn't remember the date but it was before Thanksgiving?

* * *

[404] A. He stated that the statements that he made on April the 25th was true and correct.

Q. And why did he say he had changed it in his April 28th statement?

A. He had talked to members of his family, his mother and a brother, and they had told him that he was dreaming and had nightmares.

Q. And he had said on April the 28th that what he said on April the 25th was a nightmare?

A. Yes, sir.

Q. Dreams?

A. Yes, sir.

Q. But on May the 2nd what did he say?

A. He said that what he had originally told us was true.

Q. What he said on April the 25th was true?

A. Yes, sir.

Q. Did he tell you anything else?

A. Yes, sir.

Q. What, if anything, else did he say in regard to this incident?

A. He indicated that in trying to determine the time [404a] that in going to the Cabaret, that the Cabaret started at 9:00 o'clock. He stated that the Cabaret when he got there had already been going on, that he knew it was not midnight yet.

Q. So he had gotten to the Cabaret before midnight?

A. Yes, sir.

Q. In other words, he had left Henry Street and gotten to the Cabaret before midnight?

A. Yes, sir.

Q. Where is the Cabaret?

A. It's on Monument Street.

Q. All right, and what else did he say in regard to this offense?

A. I was asking him about the money in the wallet, and he indicated that it was only three or four dollars in it. He stated that he had not searched through the wallet, he only took what he saw.

Q. All right. Did he change anything in his statement in regard to the one he gave you on April 25th?

A. Yes. He corrected the bridge. He stated that it was the Worsham Street bridge and not the Main Street bridge because he had gone across North [405] Main and up to Worsham to the Quick Check Market, and down Worsham Street, across that bridge, and when he got down to the end where the fire station was at [sic] is where he threw the wallet over the bridge and into the water.

Q. All right, so he said he crossed North Main Street and then he went on up . . .

A. By the Quick Check Market, which is on Worsham Street.

Q. And then down across the Worsham Street bridge?

A. Yes, sir.

Q. All right, and he said that he didn't search through the wallet but he took how much?

A. Three or four dollars was all that was showing. That's what he told me.

Q. And he threw the wallet over the Worsham Street bridge?

A. Yes, sir.

Q. All right. Now this was on May the 2nd?

A. Yes, sir, of 1986.

Q. Did he appear to be cooperative on this occasion?

* * *

[411] A. Okay. "My name is Terry Williams. I am thirty-one years old. I have a seventh grade education. Detective Evans has advised me of my rights and I have read them along with him. I understand my rights and I have signed a waiver that I understand my rights. I give the following statement to Detective Evans of my own free will. No threats or promises have been made to me. On Friday, April 25th, 1986, I gave some statements to Detective Evans and Brown telling them about some crimes I committed. I called my mother on Saturday, the next day, and I asked her about any blood that I had on my clothes."

Q. All right. What he did was he was talking about the crimes that he committed. He was talking about the offense here with Mr. Stone and the robbery of Mr. Stone. Is that correct?

A. Yes, sir.

Q. All right, and then he said that he talked to his mother. Is that correct?

A. That is correct, sir.

Q. All right, just read to right there. Go ahead and finish what you were reading.

[412] A. Okay. "I told my mother that I had talked to the police. She told me I needed to see a psychiatrist. I have nightmares and that was the reason I told the police about the crimes. I dreamed all the crimes I told the detectives about. I did not do them. I have also talked to my brothers on the phone. They said that I did not kill

the man on Henry Street and take his wallet. They said that he died of natural causes and he still has his wallet."

Q. So he denied these offenses, which would have been the murder and the robbery?

A. Yes, sir.

Q. That was what he was talking about when he was talking about the crimes?

A. Yes, sir.

Q. Now that was on April the 28th. Is that correct?

A. That is correct, sir.

Q. Did you have occasion to talk with him again along with Detective Brown on May the 2nd?

A. Yes, sir, I did.

Q. Was he advised of his constitutional rights at that time?

[413] A. Yes, sir, he was.

Q. Did he sign a waiver of his rights?

A. Yes, sir, he did.

Q. And I believe this waiver has been introduced as Commonwealth's exhibit number twelve?

A. Yes, sir.

Q. What did he say in regard to this offense on that occasion?

A. All right, he stated that he went to the Cabaret at the Union Hall.

Q. Let me ask you this first: Before . . . He told you some more about this offense. Is that correct?

A. Yes, sir.

Q. What did he say about the statement that he had given on April the 25th?

A. He said that the statement that he gave us on April the 25th were true.

Q. All right, and why did he say he had given the statement on April 28th saying that they were just dreams?

A. Because he had talked to his mother and brothers and they told him he was having dreams.

Q. They told him he was having dreams?

* * *

[507] JUDGE INGRAM: All right, let the record show that we are now in Chambers. The defendant is present with his attorneys.

[508] Mr. Motley and Mr. Smitherman. Also present is the attorney for the Commonwealth. All right, Mr. Motley, I believe you want to put some things on the record.

MR. MOTLEY: Yes, sir. Your Honor, the reason I had asked leave to handle this matter in Chambers, the Court may recall that we had originally asked that the defendant be examined down at Central State and following an examination of him down there by Dr. Centor and Dr. Ryans we believed it was appropriate and in order that we exercise our option under the Supreme Court

case of *Ake v. Oklahoma* to seek an independent psychiatric examination of the defendant. And the Court arranged for such independent examination by Dr. Mansheim at his office in Tidewater, Virginia, and Mr. Smitherman and I have received Dr. Mansheim's report to the Court dated September 6th, 1986 detailing the results of the doctor's findings. And what I [509] wanted to do this afternoon was to put on the record a few questions to the doctor and to state for the record why we did not call the doctor as one of our witnesses in the case although he had been the independent examining psychiatrist of the defendant.

JUDGE INGRAM: All right, before you do that let me put the doctor under oath so his testimony can be preserved.

DR. PAUL A. MANSHEIM, a witness called on behalf of the defendant, having been administered the oath by the Court, testified as follows:

DIRECT EXAMINATION

By Mr. Motley:

Q. You are Dr. Paul A. Mansheim, M.D.?

A. Yes.

Q. All right, Dr. Mansheim, we earlier have gone through your qualifications and you have given me your list of educational honors and qualifications, and of course there has been no question as to your being an expert as a foresic [sic] psychiatrist. So we won't go into all that. Dr. Mansheim, did [510] you have an opportunity

to examined [sic] Mr. Terry Williams pursuant to order of this Court?

A. Yes. I saw Mr. Williams on September 15th, 1986 in my office in Norfolk.

Q. I believe he was transported down there for you to examine him?

A. That's right.

Q. And I believe you also had the benefit of statements and materials from filed of counsel in this case. Is that correct?

A. That's correct.

Q. All right, and based on all of that you did proceed to examine the defendant and prepare a report to this Court and to counsel?

A. Yes, I did.

Q. All right, what were the specific issues that you were asked to address in examining Mr. Williams?

A. There were several. The first was an opinion with regard to competency to stand trial. The second was an opinion in regard to the defendant's mental status at the time of his alleged offenses. Another was an opinion with regard to whether or not the defendant acted under extreme mental [511] or emotional disturbance at the time of the offense, and finally whether there were any mitigating factors in his history or character.

Q. Did you proceed to examine him to answer those questions?

A. Yes, I did.

Q. And you've already testified I believe in the suppression hearing as to what tests and all were conducted and about what your examination of the defendant entailed. Following your examination, how did you respond to the issues that were given you?

A. I found that there was no evidence that Mr. Williams was incompetent by means of mental illness or mental deficiency to stand trial. Or in other words, it was my opinion that he understood clearly the nature of the proceedings that were being brought against him and in my opinion he possessed sufficient present ability to meaningly communicate with his attorney in an attempt to formulate a defense against the charges.

Q. You are telling us that you felt like he was competent to stand trial and assist in his own [512] defense?

A. Yes. With respect to his mental status at the time of the alleged offenses, I found no evidence that Mr. Williams did not understand the nature or quality of any acts that he may have performed by reason of mental illness or by reason of mental deficiency. And I found that there was no evidence that Mr. Williams was suffering from any irresistible impulse at the time of his alleged offenses.

Q. Did you feel like he could distinguish the difference between right and wrong at the time of these alleged offenses?

A. Yes. I felt that he was able to accurately assess the morality of any acts in which he may have engaged.

Q. And did you feel like he was – I guess this also goes back to the first question I asked you about competency to stand trial – but did you feel like he was competent back in the spring of this year to talk with the police about the offenses, and to sign waivers of rights forms and to make voluntary statements to the police?

[513] A. In my opinion there was no evidence of any emotional illness or mental deficiency that would impair his ability to give statements to the police or to waive any of his constitutional rights.

Q. All right. And you also examined him as far as mitigating factors are concerned. Is that correct?

A. Yes.

Q. And what was your professional conclusion following that aspect of your examination?

A. I was able to identify a couple of things that might be taken into consideration. One was that Mr. Williams pointed out that when he was charged with the armed robbery in 1976 he remembers taking the bullets from a weapon that was involved in that case in order to make sure that no one was injured during the offense. Another thing that Mr. Williams pointed out was that he felt that his 1982 conviction should not be considered as evidence of bad character on his part because he felt the conviction was unfair. And finally, although I didn't put it into my report as evidence in looking at this case, that had it not [514] been for Mr. Williams making statements, there would have been no charges to begin with. In other words, my understanding of the circumstances of the case lead me to believe that Mr. Williams could have escaped

without being charged with this offense at all had he said nothing.

Q. We don't normally split examinations, but I don't think there will be any objection.

MR. MOTLEY: Mr. Smitherman, is there anything you want to ask the doctor?

MR. SMITHERMAN: No.

MR. MOTLEY: That's all I have.

JUDGE INGRAM: Mr. Fuller, do you . . .

MR. FULLER: Yes, sir. I don't have any questions. I just want to say we are in the Judge's Chambers out of the presence of the jury. I would like to say that I don't know whether there will be any need for me to call the doctor back, but if it is, I would just like to ask, and I think we've agreed, that what he testified to this morning be stipulated and if there was any need for me to use [515] him for any reason we could just play back for the jury his testimony this morning.

MR. MOTLEY: That's fine with me. The only thing that I would anticipate that we would be needing him for if it does come down to having to put on evidence of aggravation and mitigation, I might like to get into the record and before the jury his discussion with Mr. Williams about perhaps taking the bullets from the gun that was involved in the robbery in 1976, and also Dr. Mansheim's attaching significance to the fact that he volunteered a lot of this information that was given to the police. That would be it.

CROSS EXAMINATION

By Mr. Fuller

Q. Well, of course, what he told you about taking the bullets out of the gun is strictly what he said, Dr. Mansheim?

A. That's right.

Q. You don't know yourself?

A. No.

[516] Q. And the 1982 offense that he's talking about, the breaking and entering and grand larceny, that's also what he told you?

A. Right.

Q. And the testimony you just gave about the statements, did he tell you that, or is that what I've told you about the statements or did he say anything at all to you about the statements?

A. No, he did not talk about the statement.

Q. Right. So that's basically information you gathered from others?

A. Yes.

Q. All right.

MR. FULLER: That's all I have. It's my understanding then that you feel like you can't release the doctor now?

MR. MOTLEY: Well. I don't know I feel like I could probably release him. I just, as I said, I wanted to

get on the record. There is not a lot that we have been able to draw from as far as an insanity defense or anything of that part or greatly significant mitigating [517] evidence as well.

MR. FULLER: Well, I think that's good because he was he was [sic] your own defendant and nobody could testify as to insanity.

MR. SMITHERMAN: I want to state for the record, Dr. Mansheim . . .

RE-DIRECT EXAMINATION

By Mr. Smitherman:

Q. You're saying that your observations as to his testimony, as to Mr. Williams' statements, are not . . . are assumptions and inferences drawn on by other information that you have been provided. Is that correct?

A. Yes, that's right.

Q. Not from Mr. Williams?

A. That's right.

Q. Okay, thank you.

JUDGE INGRAM: All right, is there anything else you want to ask the doctor?

MR. MOTLEY: All right, thank you, doctor.

DR. MANSHEIM: Thank you very much, Judge.

[518] JUDGE INGRAM: Do you want to excuse him?

MR. MOTLEY: I think probably we can, yes.

MR. FULLER: Maybe you'd better . . . Why don't you . . . Wait just a second and let me see.

MR. SMITHERMAN: The only thing is the, you know, statement about the bullets. I think he does put some emphasis on that, and I think that that would be somewhat important.

JUDGE INGRAM: Does he want to leave? Is that what the deal is?

MR. MOTLEY: Yes, he wants to get back.

MR. SMITHERMAN: All we do is put him on and ask him about that and that's it.

MR. MOTLEY: That would be it. That's an awful little to tie a man up for another day on.

MR. FULLER: Of course, he could say that himself, unless you don't want to put him on.

[519] MR. MOTLEY: We've already gone over that.

MR. FULLER: If he doesn't want to testify, then you would have to use the doctor.

MR. SMITHERMAN: Is there any way we could stipulate that the doctor said that?

MR. FULLER: Well, if that's what you want him for, why don't we get him back in here just for that purpose, let you ask him whatever you're going to ask him, and I'll cross examine him just on that point because we've had a little bit of conversation that we may not

want in, what we've just been saying. Have we been on the record the whole time?

JUDGE INGRAM: Yes. Yes, all of this is on the record.

MR. FULLER: So maybe we ought to get to a point where we can start all over and you can ask him what you want to get in if it comes to that, and I'll cross examine him and we will stipulate it. How's that?

MR. MOTLEY: That's fine.

[520] JUDGE INGRAM: All right, do you want to do this where we would play it for the jury?

MR. FULLER: Yes.

JUDGE INGRAM: All right, I will start out by putting him back under oath again and do that. All right, ask the doctor to come back in, please.

MR. SMITHERMAN: That's real important. Obviously it's admissible because Terry said it to the doctor and the doctor put some importance on that.

. . . .

DR. PAUL A. MANSHEIM, who had previously testified as a witness on behalf of the defendant, was recalled as a witness on behalf of the defendant, having been duly sworn, and testified as follows:

DIRECT EXAMINATION

By Mr. Motley:

Q. All right. Dr. Mansheim, just to get this into the record, you are Dr. Paul A. Mansheim, M.D.?

A. Yes.

Q. And you are engaged in the practice of psychiatry [521] in Tidewater, Virginia?

A. That's right.

Q. I believe it's already been stipulated that you are a forensic psychiatrist and . . .

MR. FULLER: If you want me to, Mr. Motley, I will stipulate his qualifications as a forensic psychiatrist.

MR. MOTLEY: All right, thank you.

MR. FULLER: If you want to go through them through, that's fine.

MR. MOTLEY: Well, I have his C.V. that we could maybe make an exhibit in the case if we had to.

MR. FULLER: That's all right with me too.

JUDGE INGRAM: All right.

Q. Dr. Mansheim, I believe pursuant to an order of this Court you examined Mr. Terry Williams the defendant. Is that right?

A. That's true.

Q. And as part of the examination I think you also examined him as to the possibility of factors in mitigation regarding these offenses. Is that correct?

[522] A. Yes, that's right.

Q. And what was the . . . Well, let me phrase the question this way: Did you have a discussion with Mr. Williams concerning this part of your examination?

A. Yes.

Q. And what were some of the things he told you about that you consider significant?

A. He said that when he was charged with an armed robbery in 1976 he took some bullets out of a gun that was used in order to make sure that no one was injured during that episode. And he felt that was significant because it was a way in which he had tried to act to make sure no one got hurt.

Q. You say he said he took the bullets out of the gun to make sure that no one would get hurt?

A. Yes.

Q. Did you have any discussion with anyone other than the defendant about that crime?

A. No.

Q. Did he volunteer this information to you?

A. Yes.

Q. Thank you. Dr. Mansheim I have no other question. There's just one other question, Dr. Mansheim, [523] excuse me. Was there an offense in 1982 that Mr. Williams discussed with you?

A. Yes, there was.

Q. Could you tell us about that?

A. Yes. Mr. Williams said that in 1982 he was arrested for breaking and entering and also for grand larceny stemming from the same incident. And with respect to the issue of mitigation, he said that he felt that he had been unfairly convicted because he was simply helping a friend move some furniture and he felt that that would be something that I should know about in the process of making an opinion about mitigating factors.

Q. He felt like there was a situation where he was wrongly convicted of that offense?

A. Right, and if people felt that he had been fairly convicted when he was wrongly convicted, then they might get the impression that his history was worse than it appears to him to be.

Q. Did he volunteer this information to you also?

A. Yes, he did.

Q. Thank you. I have no other questions.

JUDGE INGRAM: All right, Mr. Fuller?

[p 524] CROSS EXAMINATION

By Mr. Fuller:

Q. Dr. Mansheim, the only thing you know about his allegations that he took the bullets out of the pistol was what he told you?

A. That is correct.

Q. You haven't talked to the investigating officers or anyone involved in the case?

A. That is correct.

Q. And whether he did or did not take the bullets out of the pistol, you don't know of your own knowledge?

A. That is correct.

Q. All right, and this 1982 incident involving the burglary and grand larceny, did he tell you that he was caught while he was in this house, and that the owner of the house came and confronted him, and that he fought the owner?

A. He told me everything up to the point of fighting the owner.

Q. He didn't tell you about that?

A. No. I didn't know about that.

Q. And that they had all of the merchandise stacked up right at the front door, and when the owner came [525] in and asked them what they were doing, they tried to get away and he and the owner had a pretty long confrontation?

A. I know they had a discussion, that there was a misunderstanding, but I didn't know there was a physical fight.

Q. You didn't know that they fought out of the house, off of the front porch and out in the yard?

A. No, I didn't know that.

Q. All right, that's all.

RE-DIRECT EXAMINATION

By Mr. Motley:

Q. I have one or two more questions. Dr. Mansheim, did the defendant appear to be cooperative?

A. Yes.

Q. Did he seem to be sincere in what he was telling you?

A. Yes.

Q. I have no other questions.

JUDGE INGRAM: All right, gentlemen, is it agreeable to excuse the doctor?

MR. FULLER: Yes, sir, and we've agreed that if necessary to stipulate this testimony [526] before the jury.

JUDGE INGRAM: All right, Doctor, you may go. Thank you.

. . . .

With the Court, all counsel and the defendant present, the jury returned to the courtroom and gave its verdicts to the Deputy Clerk as follows:

> "We, the jury, find the accused, Terry Williams, guilty of capital murder of Harris Thomas Stone in the commission of robbery while armed with a deadly weapon as charged in the indictment. Signed, Russell L. Hines, Foreman."

DEPUTY CLERK: So say you all?

(To which they each responded in the affirmative.)

"We, the jury, find the accused, Terry Williams, guilty of robbery as charged in the indictment and fix his punishment at seven years in the penitentiary. Signed, Russell L. Hines, Foreman.

* * *

[PENALTY PHASE]

[530] MR. FULLER: First of all, if your Honor, please, I would like to introduce into evidence a certified attested copy of an armed robbery conviction of the defendant in Pittsylvania County on October 12th, 1976.

JUDGE INGRAM: Any objection to that.

Mr. Motley?

MR. MOTLEY: No, sir.

[531] JUDGE INGRAM: All right, that will be marked as Commonwealth's exhibit A.

. . . .

DONALD HOLLAND, the next witness called on behalf of the Commonwealth, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Fuller:

Q. Would you state your name for the Court and jury, please?

A. Donald Holland.

Q. Mr. Holland, back on September the 7th of 1982 where were you living?

A. 1708 South Street.

Q. Do you still live there?

A. Well, off and on with my father.

Q. At that time both your mother and your father were living. Is that correct?

A. Yes.

Q. And on that particular day I believe your parents were in Philadelphia?

A. Well, they was on their way to Philadelphia.

Q. Visiting?

[532] A. Yeah, visiting.

Q. All right, and when you came home that night tell his Honor and the members of the jury what you found.

A. Well, when I got home I noticed that the front door was open and the lights were on in the house. And I thought maybe my brother was home. So as I opened the door and stepped inside the door I met two males, black males, coming out with stereo equipment and cameras that they had broken into the house and was taking out. They had ransacked the house and tore up a lot of stuff that was already in there. They had a lot of stuff sitting at the door that they were preparing to take out at the time. And as I walked in and I asked them what was they doing in the house and one of them asked me did I live there, and I told them, "Yeah." And the one that was behind him pushed one of them into me and swung at me, and he run around me and run out, and the other one

tried to run. And me and him we fought from the inside to the ourside [sic] to out in the street. And one of the neighbors [533] heard us out there and I told them to go call the police. And they went and called the police, and the police came and they arrested him.

Q. Which one was it that you fought and held onto until the police arrived?

A. The defendant, Terry Williams.

Q. The defendant right here?

A. Yes.

Q. And you testified in that case in this court in 1983 I believe?

A. Yes.

Q. And I believe entry was gained how?

A. In the back of the house there was an air conditioner setting in the window, and they had tore the air conditioner out and just about tore the whole window out getting in.

Q. All right, and what were some of the items that were stacked up in front of the door that they were getting ready to take out?

A. Well, there was stereo equipment, speakers, a camera, a portable cassette player and they had a couple of bags sitting there with change in it that my father had been saving up. And they had a lot of [534] other stuff in a box.

Q. And one got away but you captured the defendant after fighting with him from the front, inside the house, on the front porch and out in the yard?

A. Yes.

Q. Was it over two hundred dollars worth of goods that was stacked up there to be taken?

A. It was over two hundred dollars.

Q. Way over?

A. Yes.

Q. Answer counsel's questions.

CROSS EXAMINATION

By Mr. Motley:

Q. Were all your goods recovered?

A. No.

Q. What were you out of?

A. Well, my father had a gold ring (watch) that he had that the company had given him when he retired. We never got that back. And he had about maybe fifty dollars in coins, old coins, that he had saved up. We never got those back. My mother had an engagement ring that she had. She never got that back.

[535] Q. Things that were stacked up by the window though, you got those back?

A. Yeah, we got all of those back.

Q. You weren't injured in this incident?

A. No.

Q. No other questions.

RE-DIRECT EXAMINATION

By Mr. Fuller:

Q. Mr. Holland, this watch that you were talking about was given to your father by which company?

A. P. Lorrilard.

Q. P. Lorrilard when he retired?

A. Yes.

Q. And what kind of value did he place on that watch?

A. Well, he placed a lot of value on it you know because would wear it sometimes and sometimes he just put it up and wouldn't wear it.

Q. Sentimental value?

A. Yes.

Q. He never got it back?

A. No.

Q. Your mother didn't get her wedding ring back?

A. No.

* * *

[541] By Mr. Fuller:

Q. Would you state your name, please?

A. Carolyn Gobble.

Q. Ms. Gobble, on the night of March the 5th, would you tell his Honor and the members of the jury what, if anything, you saw on West Green Street? And first of all, maybe you'd better tell us where West green Street is.

A. It's right off of Rison Street. You make a left.

Q. Rison Street comes down by where used to be old Stratford College?

A. Yes, sir.

Q. If you were to come down Rison Street from Main Street, which way would you turn?

A. You'd take a left on West Green.

Q. You'd go down behind old G.W.?

A. Yes, sir.

Q. Where the baseball field used to be?

A. Yes, sir.

Q. All right, and after you make that left how far do you go before you turn again?

A. You go about four or five car lengths and you make another turn, a sharp curve.

[542] Q. And what happened then?

A. I saw a body laying on the side of the road, and I just got a glimpse. So I turned my car around and pointed

my headlights toward the body so I could tell if it was somebody drunk, or hurt or what. And when I pulled up closer with high beams on I could see that the woman had been severely beaten. Her face was covered in blood and she was breathing like real hard. And so I left immediately and went to the EXXON service station to call for help.

Q. Who did you call?

A. I called 911 and whoever answered I told them they needed the Resque Squad and the police.

Q. Did the Rescue Squad and the police go there?

A. Yes, sir.

Q. Did you tell the police what you had seen?

A. No, sir. I drove back by there and the police were checking around then and they told me to go ahead on. I talked to a detective later that night about it.

Q. All right. So you did tell the detectives what you had seen?

[543] A. Yes, sir.

Q. All right, I want to show you Commonwealth exhibit number F and ask you if that exhibit reveals where you saw the body?

A. Yes, sir, right in here.

Q. Right in there where you are pointing?

A. Yes, sir.

Q. Right here?

A. Yes, sir.

Q. All right. I believe that's all I have right now. This place where you saw the body was in the city of Danville?

A. Yes, sir.

CROSS EXAMINATION

By Mr. Motley:

Q. Ms. Gobble. I believe you were driving through there with your boyfriend. Is that right?

A. Well, a friend of mine. I was going to drop him off on Holbrook.

Q. I see. And the woman was lying there by herself? No one was there with her?

A. No.

Q. Thank you. I have no other questions.

. . . .

[544] SERGEANT EARL WAYNE WILLIS, the next witness called on behalf of the Commonwealth, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Fuller:

Q. Would you state your name to the Court and jury, please?

A. Sergeant Earl Wayne Willis, Danville Police Department.

Q. Sergeant Willis, on March the 5th would you tell us whether or not you received a call to go up on West Green Street around where the old George Washington High School used to be?

A. One of the officers that works with me did and I responded with him.

Q. What time did you get there?

A. Approximately 3:09 p.m.

Q. 3:09 p.m. When you went there what did you find?

A. I found an elderly lady laying on the edge of the road badly beaten.

Q. All right. And I want to show you this picture right here this is Commonwealth exhibit number E, would that picture show about where you saw the [545] lady?

A. Yes, sir. She was laying where you see a bunch of white particles laying on the ground. That's the debris left over from where the Life Saving Crew worked on her, where they would tear open a package and drop the paper right where the debris is.

Q. All right, this picture right here, this is Commonwealth exhibit number F. Does this picture illustrate where you saw the lady?

A. Yes, sir, the same debris here on the left side.

Q. All right, now this picture right here is Commonwealth exhibit number D. What does that illustrate?

A. Among all this trash is a dark red spot. That appears to be where her head was laying, right beside it. There was blood, she had lost a lot of blood out of her nose and mouth.

Q. All right, what was her condition when you arrived there?

A. She was unconscious. There was a tremendous amount of blood coming out of her mouth and nose, and when she would breath she was blowing bubbles through the blood.

[546] Q. Does this picture right here, Commonwealth exhibit number C, illustrate the way her face looked?

A. Yes, sir, it does.

Q. All right, and what, if anything did you notice about her clothing?

A. She was laying flat on her back, her legs spread slightly, her feet about eighteen inches apart and her dress, or skirt, the bottom part of it was pulled up where it just covered the top of her pubic hair. Her right shoe was off, laying a few inches from her foot. Her left shoe was on, and around her left ankle was a pair of very dirty pair of men's jockey shorts. It appeared to be what she had been wearing. They were still wrapped up around her ankles.

Q. Around her. . . .

A. Left ankle.

Q. . . . left ankle. She didn't have any pants on and her dress was up to her pubic hair?

A. Yes, sir.

Q. What did you do?

A. I called for the Life Saving Crew.

Q. Did you stay there until the Life Saving Crew [547] transported her?

A. Yes, sir.

Q. All right, answer counsel's questions.

MR. MOTLEY: I have no questions.

. . . .

OFFICER STAN LORTON, the next witness called on behalf of the Commonwealth, having been duly sworn, testified as follows:

DIRECT EXAMIANTION

By Mr. Fuller:

Q. Would you state your name to the Court and jury, please?

A. Stan Lorton.

Q. You are a police officer. Is that correct?

A. Yes, sir.

Q. Officer Lorton did you receive a call to go to West Green Street at around 8:09 on the night of March the 5th of this year?

A. Yes, I did.

Q. What did you find when you arrived there?

A. Sergeant Willis was dispatched. He arrived first. I arrived about forty-five seconds to a minute later. I observed a black female, elderly, laying [548] on the side of the road.

Q. All right, and what was her condition?

A. When I approached her I noticed that she was very badly swollen in the face and to me to be disfigured and there was a lot of blood.

Q. Did you stay there until the Life Saving Crew arrived?

A. I stayed there for a short period of time. I called in, and I thought the woman had been raped at first. Then I went and assisted with the traffic.

Q. Why did you think that?

A. Because of her panties were down, pulled down below her legs and her skirt was raised up.

Q. That's all I have.

CROSS EXAMINATION

By Mr. Motley:

Q. Did it turn out subsequently that she had not been raped or sexually assaulted?

A. I don't know.

Q. No other questions.

. . . .

DR. CHARLES A. WHITTEN, the next witness called on behalf of the Commonwealth, having been duly sworn, testified as follows:

[549] DIRECT EXAMINATION

By Mr. Fuller:

Q. Would you state your name to the Court and jury, please?

A. Charles a Whitten.

Q. You are a neuro surgeon. Is that correct?

A. Yes, sir.

MR. FULLER: Will you stipulate his qualifications?

MR. MOTLEY: Yes, sir.

JUDGE INGRAM: All right.

Q. Dr. Whitten, did you have an occasion to treat an Alberta Stroud?

A. Yes.

Q. When did you first see her?

A. March of '86.

Q. And do you know what day it was?

A. I think it was about the 6th, I'm not sure. The 5th.

Q. The 5th. All right. And what was her condition when you received her?

A. I saw her in the emergency room initially, and she was brought in unconscious, and multiple injuries, bruising of her face, facial fractures and obvious [550] brain injury, and not moving the left side of her body, in shock and Dr. Sprinkle, a general surgeon, saw her then. She had intraabdominal bleeding from a perforated viscus. He took her to surgery.

Q. Where were her injuries noticeably?

A. Brain.

Q. Brain?

A. She had severe head injuries, particularly the right side of her face where she had a lot of fractures.

Q. How about her stomach area?

A. And her abdomen, yes, sir.

Q. And that's where surgery was performed by Dr. Sprinkle.

A. Yes, sir.

Q. Was there anything you could do surgically?

A. No, sir.

Q. Is there anything that can be done now?

A. No, sir.

Q. What is her condition now?

A. I haven't seen her, but I understand she's in a nursing home and she's still vegetating.

Q. She's just a vegetable?

A. Yes, sir.

Q. Is there any hope for a better prognosis?

[551] A. Not much at this . . .

MR. MOTLEY: Your Honor, if he hasn't examined her and all, I don't see how he's able to give a prognosis.

JUDGE INGRAM: All right.

MR. FULLER: All right, I'll withdraw that.

Q. But she had brain damage?

A. Yes, sir.

Q. And it's not reversible. Is that correct?

A. No, sir.

Q. That's all I have.

CROSS EXAMINATION

By Mr. Motley:

Q. Dr. Whitten, when did you say the last time was than you examined her?

A. When she was at the hospital.

Q. Do you know approximately?

A. Several weeks after she entered.

Q. Do you know approximately when that was?

A. I assume it was around May or April.

Q. You have not seen her since that time?

A. No, sir.

Q. Thank you. I have no other questions.

* * *

[554] A. I am T. A. Brown, Detective, Danville, Virginia Police Department.

Q. Detective Brown, on April the 25th of this year Police Chief Neal Morris turned over to you an anonymous letter delivered to him from the jail. Is that correct?

A. Yes, sir.

Q. Pursuant to that letter I believe you and Detective Evans testified that you started looking at I block to determine who was in I block. Is that correct?

A. Yes, sir.

Q. First of all let me show you the letter that you received.

MR. FULLER: You've seen this letter?

MR. MOTLEY: Yes, sir.

Q. Is this the letter you received from the police chief?

A. Yes, sir, it is.

Q. Would you read that letter, please?

A. "Dear sir, I can't write or spell too good, so bare [sic] with me. I know what I am saying and what I am doing, what I am going to do. I called [555] Captain Doss back in February of this year one night about 2:25 p.m. and told him about that man down on Henry Street. I said that I might have known what happened to him but I didn't leave my name. Well, I kill him myself. All them cars someone went in while those people were at work. I went in those cars, mills, hotels, on the street just about all over Danville. And also that lady on West Green Street. I did it, but I am very sorry I did. I just can't hold all this inside of me. It's getting to the point that I don't know who I am anymore. I will only talk to you, please. I cell, city jail."

MR. FULLER: I would like to introduce this into evidence if your Honor, please.

JUDGE INGRAM: All right that will be Commonwealth exhibit G.

Q. This ink on the letter was put there by the police department. Is that correct?

A. Yes, sir. That's ninhydrim, a chemical, a chemical used to raise fingerprints.

Q. Before you knew who it was from you dusted it for fingerprints?

[556] A. Yes, sir.

Q. All right, now pursuant to this letter that was put in the hands of the police chief, you and Detective Evans talked to the defendant. Is that correct?

A. Yes, sir.

Q. You picked him out first?

A. Yes, sir.

Q. All right, now you confronted him with this anonymous letter that has been introduced into evidence. Is that correct?

A. That's correct, sir.

Q. He first denied writing it but then after taking about thirty seconds, asking you-all to leave, he called you back in and admitted writing it?

A. Yes, sir.

Q. He had been advised of his constitutional rights?

A. Yes, sir.

Q. And that advice of rights has been introduced into evidence. Is that correct?

A. Yes, sir.

Q. He then gave you a statement. Is that correct?

A. Yes, sir.

Q. More than one statement?

[557] A. Yes, sir.

Q. And one statement which was taken at 5:58 p.m. involved this malicious wounding. Is that correct?

A. Yes, sir.

Q. All right.

MR. MOTLEY: Your Honor, we would again for the record renew the objection we made earlier concerning statements.

JUDGE INGRAM: All right. That objection will be overruled for reasons previously stated. The Court will note your exception to the Court's ruling.

MR. MOTLEY: Your Honor, I would also note just to save time and aggravation that my objection is continuing.

JUDGE INGRAM: All right.

MR. FULLER: All right, the Court has already ruled. I believe that Court ruled on this last Wednesday. And we'll make that a part of the record in this case.

JUDGE INGRAM: All right, we'll make the Court rulings in that case, the [558] reasons stated that it's admissible here at this time.

MR. MOTLEY: Your Honor, again, the same objection, the same grounds that I've had all along. So it's not really new grounds or anything the Commonwealth or the Court is not familiar with.

JUDGE INGRAM: All right.

Q. All right, Detective Brown, on the afternoon of April 25th when the defendant gave you a statement concerning Harris Thomas Stone, which we've previously tried today, he also gave you a statement in regard to Alberta Stroud. Is that correct?

A. Yes, sir.

Q. He had been advised of his constitutional rights?

A. Yes, sir.

Q. And he waived his constitutional rights?

A. Yes, sir.

Q. That waiver was the same waiver that he was given in regard to the Harris Thomas Stone case?

A. Yes, sir.

Q. And then he gave you a series of statements?

A. Yes, sir.

[559] Q. Is that one of the statements you have before you?

A. Yes, sir, it is.

Q. In regard to Alberta Stroud?

A. Yes, sir.

Q. Would you read that for the jury, please?

A. "My name is Terry Williams. I am thirty-one years old. I have a seventh grade education. I have been advised of my rights and I have signed a waiver of my rights. I make the following statement of my own free will with no threats or promises having been made to me. I don't remember the date, but one evening I was walking up Main Street. I had gone by the bus station walking up Main Street. As I was walking I met up with a lady. She asked me where Pine or Paxton Street was at. I told her that I would show her. As we was walking up Main Street she told me about someone had robbed her. She said that someone came to her house and took her money from under her mattress. She said it was all the money that she

had. When we got to Holbrook Avenue we took a left on Holbrook Avenue. We walked down Holbrook Avenue and then we got to West Green Street. We [560] took a right onto West Green Street and we started walking down it. As we walked down West Green Street, we had turned the first corner, and she said something about this being the wrong way. I thought that she then said something bad or cursed me. Then I just knocked her down with my hand. When she was down I started hitting her and kicking her over and over again. I then pulled her dress up and pulled her panties down. I then started hitting on her again. She kept saying, "Stop. Please stop." Something came over me and I realized what I was doing. I then noticed I had blood on me. I had blood on my shoes, my pants legs and on my hands. She was bleeding from her face. I then left her there and I started walking. I walked all the way up to the Schoolfield mill. I then realized where I was at and I said, "I'd better go on home." I then walked home, which is on Henry Street. The next morning I heard the news on the radio about the lady. I then saw the blood on me and I said, "What have I done?" I though it was all a bad dream until I realized the blood was on me. Last night I wrote a letter [561] to the chief of police about what I had done. I wanted to get it out as to what I had done and get some help for me. Detective T. A. Brown has read this statement back to me and it's true and correct to the best of my knowledge. Signed, Terry Williams."

MR. FULLER: I would like to introduce this statement into evidence if your Honor, please.

JUDGE INGRAM: All right, it will be marked as Commonwealth's exhibit H.

Q. Now that was on Friday, April 25th. Is that correct?

A. Yes, sir.

Q. On April 28th you weren't present when the defendant called Detective Evans and gave another statement. Is that correct?

A. Yes, sir.

Q. And in that April 28th statement he retracted the statements he had given on April 25th. Is that correct?

A. Yes, sir.

Q. He said it was dream?

A. Yes, sir.

[562] MR. MOTLEY: Your Honor, I'm going to object to the line of leading questions.

MR. FULLER: Well, they are leading, but if he doesn't want that in, that's all right with me. I'll stop right there. I just want to be fair about it. That's all I have.

CROSS EXAMINATION

By Mr. Motley:

Q. Detective Brown, as far as the statements he gave you, these were voluntary on his part weren't they?

A. Yes, sir.

Q. And I believe he indicated that he felt like he had lost control of himself or he wanted some help. Is that also correct?

A. Yes, sir.

Q. What was your reaction to his indication that he said he wanted to talk or get it into the open?

A. He stated that it was bothering him, he needed to get it off his chest, his conscience was bothering him and he wanted to talk about it.

Q. He cooperated with you fully?

[563] A. Yes, sir.

Q. Now it's already in evidence that he took back some of these things that he said first in these cases, but he later, a few days later, came in and again confessed to these matters. Is that correct?

A. Yes, sir.

Q. I think you had been away one day, and you came back and you and Detective Evans sat down with him and he again said that he had done these things, such as Mr. Stone's death on Henry Street and Mrs. Stroud's assault up on West Green Street. Is that right?

A. Yes, sir.

Q. And I think he also told you about two automobile thefts that he had been involved in?

A. Yes, sir.

Q. And it was your impression that he wanted to get this into the open, clear the air and get it off his conscience?

A. Yes, sir.

Q. On any of these charges would the detective department have known anything much to go on had it not been for these statements?

[564] A. Do you mean in regard to Mr. Williams?

Q. That's right, from regard to solving the crimes?

A. No, sir, not concerning Mr. Williams.

Q. In fact, you-all really didn't have a good solid lead on any of these things until Mr. Williams wrote Chief Morris and then came forward and started making these statements. Isn't that correct?

A. Yes, sir.

Q. And that includes both the case involving Mr. Stone and the case involving Mrs. Stroud. Is that right?

A. Yes, sir, because we wasn't investigating Mr. Stone at all.

Q. Right. Mr. Stone had pretty much been a closed case?

A. Yes, sir.

Q. And then he came forward and told you about that, and also about Mrs. Stroud and about two automobiles?

A. Yes, sir.

Q. In fact you had to go get out all of the old automobile theft files just to see what he was talking about. Isn't that right?

A. Yes, sir.

Q. No other questions.

[565] RE-DIRECT EXAMINATION

By Mr. Fuller:

Q. Detective, do you have a taped conversation in regard to this?

A. Yes, sir.

Q. Do you have it with you?

A. I have the transcript of it.

Q. Do you have the tape?

A. Not on me.

Q. I have it . . . It's already been introduced.

A. Yes, sir.

Q. Will you play that tape?

The taped interview of Terry Williams being questioned by Detective T. A. Brown in the presence of Detective C. D. Evans, was then played for the Court and jury, which was as follows:

Examination of Terry Williams by Detective T. A. Brown:

Q. "This is Detective T. A. Brown and Detective C. D. Evans. Present with me is Terry Williams, who has indicated he is thirty-one years of age, and today's date is April the 25th, 1986. The time is 4:35 p.m. Mr. Williams was advised of his rights and he signed a waiver of his

rights. At this time, [566] Mr. Williams, would you please state your name?

A. Terry Williams.

Q. And how old are you, Mr. Williams?

A. Thirty-one.

Q. And you have been advised of your rights?

A. Yes.

Q. And you understood what your rights were?

A. Yes.

Q. You signed a waiver of your rights?

A. Yes.

Q. Now we have talked to you concerning a female that was beat up on East Green Street.

DETECTIVE EVANS: West Green Street.

A. West Green Street. Would you in your own words tell us what happened on that evening, and approximately when it was, and where you first met the lady at and what transpired after that?

A. Well, I was walking up Main Street, and I walked, walked into this lady. She told me that she had been robbed. And she wanted to know where Pine Street was and I told her I would walk with her up there. We walked up Main Street all the way up to Holbrook and I told her to go down Holbrook Street. And we [567] went up Holbrook Street, and its a little ol' short off alley. They call it West Green Street. We walked down there. When

we got to the bottom of the hill, I don't know, just, she said something, is this the wrong way, or something, and I thought she said something bad and I knocked her down.

Q. What did you knock her down with?

A. With my hand.

Q. Okay, go ahead.

A. I knocked her down, and I hit her, and kicked her, and hit her, and kicked her, and hit her and kicked her, and I pulled up her dress, and pulled her panties down, and I kicked her and she was saying, 'Stop, please stop.' And just, I just couldn't stop. I just hit her, and kicked her, and then look like something just went over me and I tried to realize what I was doing, and by that time she was just laying there. I got scared and I just left.

Q. All right, when you left, was there anything on your clothes or anything from her?

A. It was, it was some, her blood that was coming off her face was on my pants, and on my shoes and on my [568] hands.

Q. What was the purpose for your pulling her panties down?

A. I don't know, I, I don't know. I just though I was somebody else, I don't know.

Q. Did you have any type of sex with her?

A. No, not that I recall.

Examination of Terry Williams By Detective C. D. Evans:

Q. Did you know this lady, Terry, did you know her name?

A. No, that's – that was the first time I ever seen her.

Q. All right, approximately what time did you meet her on Main Street? You was walking. Tell me how you met up with her.

A. I was coming up there, she was standing on the corner. She was walking towards, up Main Street, I don't know. It won't all that late. It was kind of early, maybe seven, seven-thirty or eight o'clock.

Q. Was you drinking?

A. No.

Q. You hadn't had anything to drink?

A. No.

Q. Okay. I understand that you said something come [569] over you?

A. Yes.

Q. You don't know what it was?

A. No.

Q. And after you left her there in the alley, where did you go?

A. I walked, and I walked up 'til I, 'til I realized I was up at Schoolfield mill. And then I caught a'hold of myself and I went home.

Q. The next morning you woke up . . .

A. I woke up and went downstairs, and my mother had the radio on and I heard about this lady being beat and my mother was in the kitchen and I looked down and I had some blood in my fingernails. I said, 'God, man, what I done did?' And I went upstairs and I looked at my pants that I had on, and they had blood all on them.

Q. Terry, did you take anything from that lady that day, that night?

A. Nawh, I didn't, I didn't take anything 'cause she didn't have anything, no pocketbook or nothing.

DETECTIVE BROWN: Well, did she say anything regarding what she told you about [570] being robbed?

MR. WILLIAMS: Well, she said somebody had ran in . . . ran in her house, and went up under her mattress and took her money, took all her money, that was what she said.

Q. And today, this letter that we showed you, did you write that letter?

A. Yes.

Q. And you . . . When did you write it?

A. I wrote it last night around one, maybe one thirty or two o'clock 'cause, you know, ever since it heppened [sic] I won't be able to sleep 'cause it's been on my mind and I just wanted to get it off my chest, and I knew it was wrong and now I'm very sorry I did it.

Q. So on you own free will you wanted to tell us what happened?

A. Yes, on my own free will.

DETECTIVE BROWN: Is there anything else about this lady that you need to tell us?

MR. WILLIAMS: No.

Q. Terry, that photo that I showed you of the scene [571] where the lady was found, which there is nobody in the scene, you saw the photo. Am I correct?

A. Yes.

Q. And you pointed out to me where you left the lady lying. Correct?

A. Yes.

Q. And that's right?

A. Yes.

Q. Okay.

DETECTIVE BROWN: This ends the conversation with Terry Williams with Detective T. A. Brown and Detective C. D. Evans. The time is 4:42 p.m. The date is April 25th, 1986."

MR. FULLER: Your Honor, I would like to introduce that tape into the evidence.

JUDGE INGRAM: All right, that will be marked as Commonwealth's exhibit I.

MR. FULLER: I would also like to introduce a copy of the tape that was transcribed.

JUDGE INGRAM: That will be Commonwealth's exhibit J.

Q. That's all I have right now.

[572] JUDGE INGRAM: All right, any other questions?

MR. MOTLEY: Yes, sir.

RE-DIRECT EXAMINATION

By Mr. Motley:

Q. I believe you asked Terry Williams on the tape if the woman had been raped, and he said, "No." Is that right?

A. I asked him if he had any sex, and he said, "No."

Q. Right. And it again was he who initiated the conversation with you about this?

A. Yes, sir.

Q. No other questions.

. . . .

EUGENIA STAMPS, the next witness called on behalf of the Commonwealth, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Fuller:

Q. Would you state your name to the Court and jury, please?

A. Sir?

Q. Would you tell the Court and jury your name?

A. Eugenia Stamps.

Q. Mr. Stamps, you know Alberta Stroud don't you?

[573] A. Yes, sir, I know her.

Q. She was your friend. Right?

A. Yes, sir. Just a patriotic friend, not a . . .

Q. Right.

A. I got different kind(s) of friend.

Q. Okay, Mr. Stamps.

I been knowing Alberta for about thirty-five or forty years I guess.

Q. Well, Mr. . . .

A. I never got close to her until the last ten years I guess.

Q. Okay, Mr. Stamps, when was the last time you saw her on the night of March the 5th, about what time?

A. It was about 7:35.

Q. And where did you see her, Mr. Stamps?

A. I saw her on Jefferson Street.

Q. On Jefferson Street?

A. Yeah.

Q. And what . . . Did she tell you what had happened to her that day?

A. Yeah, she told me somebody had took her money.

Q. Took her money?

A. Uh-huh.

[574] Q. Okay, and you saw her on Jefferson Street about 7:30?

A. Yeah, just about 7:30.

Q. All right, and where was she going after that? Where did you see her last?

A. I saw her on Jefferson. She was just coming out of her apartment.

Q. She lived on Jefferson?

A. Uh-huh. And I walked down about thirty or forty feet down, and I looked over across the street and I saw her standing across the street. Then I gave her those capsules called Time Release. Twelve Hour Time Release tablets, you know that I had.

Q. You had bought her some cold tablets?

A. Yeah.

Q. Had a mellow yellow?

A. Yeah, that's right. Yeah.

Q. Had a mellow yellow?

A. Yeah.

Q. Okay, which direction was she going in when you last saw her?

A. When I last saw her she was headed towards up to [575] Holbrook Street, Main Street. She went up Mail Street.

Q. She was on Main Street going up towards Holbrook?

A. Uh-huh, yeah. Uh-huh.

Q. That's the last time you saw her?

A. The last time I saw her?

Q. And that was about what time?

A. That was about 7:30 . . .

Q. 7:30?

A. . . . or 7:35.

Q. Did you ever see her after that?

A. I never did see her any more after that. She said, "When I come back I will call you."

Q. But she didn't call?

A. No.

Q. That's all I have, Mr. Stamps.

CROSS EXAMINATION

By Mr. Morley:

Q. Mr. Stamps, you said you had been good friends with Ms. Stroud for a number of years?

A. Right.

Q. How old was she?

A. Sir?

[576] Q. How old was Ms. Stroud?

A. How long?

Q. Sir?

A. I beg your pardon. I didn't understand you.

Q. How old was Alberta Stroud?

A. Well, how old was she? I really don't know. She said she was around seventy, or seventy-five or seventy-six, something like that.

Q. Do you know she was younger than you were?

A. I don't know that. I'm seventy-five. I don't know nothing about her age. I [sic] never around her a lot. I didn't live with her you know I didn't know about her age.

Q. All right, thank you. No other questions.

MR. FULLER: Thank you, Mr. Stamps. That's all we have for you.

. . . .

DR. LAMONT PERRY, the next witness called on behalf of the Commonwealth, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Fuller:

Q. Would you state your name for the Court and jury, [577] please?

A. Dr. Lamont Perry.

Q. Dr. Perry, what is your specialty?

A. Family practice.

Q. All right, and have you had occasion to have Alberta Stroud under your care?

A. She's currently a patient of mine.

Q. Alright, and when did she become a patient of yours?

A. In April of this year.

Q. And who referred her to you?

A, Dr. Sprinkle.

Q. All right.

MR. FULLER: Is there any question about Dr. Perry's qualifications?

MR. MOTLEY: Not at all. I'll stipulate them.

MR. FULLER: All right.

Q. Dr. Perry, what was her condition when she came under your care?

A. Basically the patient was in a – using layman's terms – in a vegetative state. That is she was being fed by

tube, could not speak and could not [578] perform any of her normally valid functions.

Q. All right, and what did you do for her?

A. It's basically custodial care that I'm providing the patient right now. She's residing in the nursing home at Roman Eagle. And she's being fed by tube. She has catheter drainage of her bladder. She gets skin care and basic nursing functions.

Q. What is the . . . Is there any hope for a better prognosis?

A. No. As a matter of fact, the prognosis is poor.

Q. And she's just in a vegetative stage. Is that correct?

A. A vegetative stage. Exactly.

Q. And there doesn't appear to be any hope that she [sic] ever get any better?

A. No.

MR. MOTLEY: No questions.

MR. FULLER: Thank you, Dr. Perry.

. . . .

MR. FULLER: I'll just wait until we take a break to get the tape together of Dr. Sprinkle.

. . . .

[579] DETECTIVE C. D. EVANS, who had previously been called as a witness on behalf of the Commonwealth, was recalled as a witness on behalf of the Commonwealth, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Fuller:

Q. State your name for the Court and jury, please?

A. Detective C. D. Evans.

Q. Detective Evans, were you with Detective Brown on April 25th when the police chief turned over to you an anonymous letter?

A. Yes, sir, I was.

Q. And you went to cell block I and found that there were how many people in there?

A. Four.

Q. And which one did you decide to talk to?

A. Terry Williams.

Q. Why Terry Williams?

A. Because I knew Terry in the past.

Q. All right, and what in the past was it that caused you to talk to Terry?

A. Back on December the 4th of 1985 I went to an address [580] on Keen Street, the residence of Mr. Soloman. There had been a fire in that house and Mr. Soloman had gone to the emergency room, the hospital. I went up there and he had a small cut in his side. And he stated he was missing some money. At that time I interviewed Terry Williams.

Q. All right. So based upon your conversation there you decided to talk to Terry Williams first?

A. Yes, sir.

Q. Did he give a statement on the 25th in regard to the malicious wounding of Alberta Stroud?

A. Yes, sir, he did.

Q. After having been advised of his constitutional rights?

A. Yes, sir.

Q. All right, and then on April the 28th were you working?

A. Yes, sir. I was.

Q. Did you have an occasion to talk to the defendant, Terry Williams, again?

A. Yes, sir.

Q. Were you going to talk to him anyway?

A. Yes, sir.

[581] Q. And why, did he want to talk to you?

A. Yes, sir, he did.

Q. All right, and at that time could you tell us whether or not he wanted to give another statement?

A. Yes, sir, he did.

Q. Before doing so, did you advise him of his constitutional rights?

A. Yes, sir, I did.

Q. And did he sign a waiver of his constitutional rights?

A. Yes, sir.

MR. FULLER: That's already been introduced in this case.

JUDGE INGRAM: Right. All of these waivers were previously admitted in the case in chief.

Q. Then did he give you another statement?

A. Yes, sir, he did.

Q. Read that other statement if you will.

A. "My name is Terry Williams. I am thirty-one years old and I have a seventh grade education. Detective Evans has advised me of my rights, and I have read them along with him. I understand my rights and I have signed a waiver that I understand my [582] rights. I give the following statement to Detective Evans of my free will with no threats or promises made to me. On Friday, April 25th, 1986, I gave some statements to Detective Evans and Brown telling them about some crimes that I committed. I called my mother on Saturday, the next day, and asked her about any blood that I had on my clothes. I had mentioned to the detectives that I had found blood on my clothes and hands the next morning after the lady was beaten by me. My mother said that my clothes did not have any blood on them. I told my mother that I had talked to the police. She told me that I needed to see a psychiatrist. I had nightmares and that is the reason that I told the police about the crimes. I dreamed all the crimes that I told the detectives about. I did not do them. I've also talked to my brothers on the phone. They said that I did not kill the man on Henry Street and take his wallet. They said that he died of natural causes and that he still

had his wallet. Today, Monday, April 28th, 1986, Detective Evans picked me up and I told him that I [583] had nightmares, that I had told him that Holbrook Street was where me and the lady walked. But that is not right. I showed Detective Evans where I first saw the lady that night, and I pointed to the front of Main Street Methodist Church. We walked up Main Street and passed Holbrook Street. I showed Detective Evans where I walked to with the lady, and it was Park Avenue Extension behind the Schoolfield Recreation Center. This is where I beat the lady up in my dreams. All the crimes I admitted to were dreams. I have read and Detective Evans has read me back the above statement and it is true and correct. Signed, Terry Williams."

Q. All right, now Detective Evans, . . .

MR. FULLER: I would like to introduce this statement into the evidence, if your Honor, please.

JUDGE INGRAM: All right, that will be Commonwealth exhibit K.

Q. . . . did the defendant point out to you on any of these pictures where before he gave this statement retracting it, where the lady was that [584] he first told you on April 25th that he beat?

A. Yes, sir.

Q. Where was it?

A. He pointed right here, and that was where Ms. Stroud was found.

Q. He pointed out right where she was found?

A. Yes, sir.

Q. Then on April 28th he retracted that and said it happened up around the Schoolfield Y?

A. Yes, sir.

Q. In his dream?

A. In his dream.

Q. On May the 2nd did you and Detective Brown have an occasion to talk to the defendant again after having advised him of his constitutional rights?

A. Yes, sir, we did.

Q. Did he at that time indicate which of the statements was true?

A. Yes, sir, he stated the true statement he gave us Friday was true.

Q. On what date?

A. April the 25th.

Q. The 25th?

[585] A. Yes, sir.

Q. That that statement was true?

A. Yes, sir.

Q. Why did he say he made the retraction?

A. Because he had talked to his mother and brothers over the weekend, and they told him he had been having dreams and nightmares.

Q. But he said the April 25th statement was true?

A. Yes, sir.

MR. FULLER: If your Honor, please, I would like to introduce into the evidence the conviction of the defendant for malicious wounding on Wednesday of last week.

MUDGE INGRAM: All right. That's an order of this Court. That will be marked as Commonwealth's exhibit L.

MR. FULLER: This is the conviction for the malicious wounding of Alberta Stroud.

Q. Now, Detective Evans, in regard to the Soloman situation, when you were interviewing him on April 25th after having advised the defendant of [586] his constitutional rights, did he say anything about that incident?

A. Yes, sir, he did.

Q. Did he give you a statement?

A. Yes, sir.

Q. Do you have that statement?

A. Yes, sir.

All counsel approached the bench, and following a conference with the Court, which was out of the hearing of the jury and not made a part of the record, the following occurred:

MR. SMITHERMAN: Judge, your Honor, could we request the jury to step out for a minute?

JUDGE INGRAM: All right, take the jury out.

The jury then retired to the jury room, and with the Court, all counsel and the defendant remaining in the courtroom, there was a conference between the Court and counsel, which was not made a part of the record, after which the following occurred:

MR. SMITHERMAN: Your Honor, we would note . . .

MR. MOTLEY: Just note our exception.

* * *

[588] Q. Detective Evans, did you take a statement from the defendant in regard to the incident at Mr. Soloman's house?

A. Yes, sir, I did.

Q. Was that statement taken after he had been advised of his constitutional rights?

A. Yes, sir.

Q. And was he advised. . . . This was on April 25th. Is that correct?

A. Yes, sir.

Q. I'll show you this waiver of the defendant's constitutional rights, which is commonwealth's exhibit number six. Is this the waiver of his rights that you read him?

[589] A. Yes, sir.

Q. And is this the waiver of the rights that he signed on April 25th?

A. Yes, sir, it is.

Q. And then he gave you a statement involving the death of Harris Thomas Stone, the malicious wounding of Alberta Stroud and then this statement that you are about to read. Is that correct?

A. That's correct, sir.

Q. That was all after he had been advised of his constitutional rights, which is represented by Commonwealth's exhibit number six. Is that correct?

A. Yes, sir.

Q. All right, would you read that statement?

A. "My name is Terry Williams. I am thirty-one years old and I have a seventh grade education. I have been advised of my rights and I understand my rights. I have signed a waiver that I understand my rights. I make the following statement to Detective Evans and Brown of my own free will with no threats or promises made to me. I don't remember the date, but it was about 3:30 a.m. [590] when I was walking home from the south end of town. I was feeling depressed and did not have any money. I noticed behind my house that Mr. Soloman was home. Mr. Soloman is an old man that has an apartment behind my house. I went up the steps to Mr. Soloman's apartment and the porch door was open. The door that leads into Mr. Soloman's apartment was locked. I heard Mr. Soloman in there and he was coughing. I saw some clothes hanging on some clothes racks on the porch, and I got a match and lit a fire on the clothes and put them next to the door. I went back down the steps and waited for the flames to get higher and then I came back to the

porch. Mr. Soloman was opening the door trying to put out the fire. I helped him put the fire out. Mr. Soloman was bending over and I went in the kitchen and got a small steak knife. Mr. Soloman had handed me a pail and wanted me to get some water in it. While I was in the kitchen I got the knife. I hit Mr. Soloman in the side one time with the knife. Mr. Solomam fell over, and I reached in his front pocket and got two [591] twenties, two fives and two ones. I made sure the fire was out and then I went to the Quick-Check on Worsham Street and called the 911 number to report the fire. I then went back to the scene to make sure that Mr. Soloman was all right. The same morning the police picked me up and talked to me, but I did not tell them the truth. Something wanted me to tell the truth, and something didn't. Detective Evans read me back this statement and it is true and correct. Signed, Terry Williams."

MR. FULLER: I would like to introduce this statement into evidence, if your Honor, please. That has been marked I think.

JUDGE INGRAM: All right, that's Commonwealth's exhibit L.

MR. FULLER: Okay.

Q. All right, now, Detective Evans, going back to the Alberta Stroud case, do you know how old she was?

A. Alberta was in her late seventies I think.

Q. Late seventies?

A. Yes, sir.

[392] Q. All right. That's all I have right now.

CROSS EXAMINATION

By Mr. Motley:

MR. MOTLEY: May I see the statement?

Q. Detective Evans, . . .

A. Yes, sir.

Q. . . . this was one of several statements that Terry Williams gave you on April the 25th. Is that right?

A. That's right, sir.

Q. You-all had talked with him that afternoon about the . . . about Mr. Stone over on Henry Street, about Ms. Stroud?

A. Yes, sir.

Q. And two other things?

A. Yes, sir.

Q. These two cars. And also Mr. Soloman?

A. Yes, sir.

Q. Now I think this statement contains a statement by Terry Williams that he said that he started this fire, then he made sure the fire was out and he called the fire department. Is that right?

A. That's right.

Q. And he also indicates in here that he went back to [593] the scene and made sure that Mr. Soloman was all right?

A. Yes, sir.

Q. This was after he said that he admitted to hitting him and taking his money?

A. That's right.

Q. And I think he also said – Mr. Williams said – "Something wanted me to tell the truth and something didn't."?

A. That's right, sir.

Q. Did he appear to want to be truthful when he gave you this statement?

A. Yes, sir, he appeared to be.

Q. Did he say anything about wanting to clear his conscience, get it out of his system?

A. Yes, sir.

Q. As I read the statement it seems like it was some kind of debate in him whether to tell the truth or not to tell the truth and he decided to tell the truth?

A. Yes, sir.

Q. And he was cooperative when he gave you that statement?

[594] A. Yes, sir.

Q. Thank you. I have no other questions.

MR. FULLER: You may step down.

. . . .

DETECTIVE T. A. BROWN, who had previously testified as a witness on behalf of the Commonwealth, was

recalled as a witness on behalf of the Commonwealth, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Fuller:

Q. You are detective, Tom Brown. Is that correct?

A. Yes, sir.

Q. Detective Brown, do you have a tape recording of a statement that the defendant gave in regard to Mr. Soloman?

A. Yes, sir.

Q. And was he advised of his constitutional rights before he gave the statement?

A. Yes, sir, he was.

Q. Was this statement pursuant to his being advised of his constitutional rights on April the 25th?

A. Yes, sir.

Q. And he gave you a series of statements, and this was [595] one of them?

A. Yes, sir.

Q. Do you have the tape?

A. Yes, sir.

Q. Would you play it, please?

The following is the taped interview of Terry Williams by Detective T. A. Brown in the presence of Detective C. D. Evans:

"This is Detective T. A. Brown. Present is Detective C. D. Evans and present also is Mr. Terry Williams.

Q. Mr. Williams, will you state you name, please?

A. Terry Williams.

Q. And your age?

A. Thirty-one.

Q. Mr. Williams, you have been advised of your rights and signed a waiver of your rights. Is that correct?

A. Yes.

Q. And you did that of your own free will, freely and voluntarily?

A. Yes.

Q. And you understood what your rights were. Is that correct?

[596] A. Yes.

Q. You have told us this evening concerning Mr. Soloman I believe of a house behind where you live. Is that correct?

A. Yes.

Q. Where do you live?

A. Right there on the corner of Keen and Henry.

Q. And which house does Mr. Soloman live in?

A. He rents an apartment on up Keen Street right behind my house.

Q. Okay. What do you recall what happened with Mr. Soloman?

A. Well, one night as I was coming home late, I didn't have no money and I was very depressed, and I went up to Mr. Soloman's house. And I noticed there won't no lights on. And I know he was in there. The front door and the first door was open. And I went to the front door, and that first door, I went in there. And the other door was shut. I heard him coughing and evidence that he was in there. He was awake. And at that time I pushed on the door and I couldn't get it open. About that time I grabbed some of the clothes he had hanging up and [587] popped me in my face. And I lit a match to them and stuck them right in front of the door. And they were burning. And I went down to the . . . down the steps, and I waited until the flames got bigger and bigger. At one point he came to the door and then he opened it, and it was burning. And I ran out and I helped him put it out. As he was putting it out he was coughing, 'cause a lot of smoke was in the house. And at that time he was bending over, and I went into the kitchen and I grabbed a knife, a small steak knife, and I just plunged him in the side with it. I don't know whether I wanted him to die or just wanted to see what he had in his pocket. As he fell to the floor I reached in his pocket and I grabbed some twenties, and . . . two twenties, and two tens and a couple of ones out of his pocket. At that point I made sure that the fire was out, because I really didn't want the man to die. And at that point I left and went to the Quick Check and called the Rescue Squad and the fire department.

Q. And you were later interviewed by Detective Evans and myself. Is that correct?

[598] A. Yes. I didn't admit to it because, I mean, it just seems like I don't know what got over me, but now I realize that things were very wrong, and I am fully aware of the punishment that I'm going to receive. That's why I wanted to get some help for what I was doing.

DETECTIVE BROWN: This interview is ended. The time is 5:47 p.m."

MR. FULLER: I would like to introduce this tape into evidence, if your Honor, please.

JUDGE INGRAM: All right, that will be Commonwealth's exhibit N.

Q. Detective Evans, when did this take place, involving Mr. Soloman?

A. I'm note sure of the date because I wasn't involved in the initial investigation. It was back in December.

Q. All right, it was after the murder of Mr. Stone?

A. Yes, sir.

MR. FULLER: Now I would like to also introduce at this time, if your Honor, please, the tape in regard to the case [599] that we have just tried involving Harris Thomas Stone. We did not introduce it at the time because it had some remarks about these other cases. I don't think it's necessary to replay it because the jury has now heard everything that at that time could be introduced.

JUDGE INGRAM: All right, that will be marked as Commonwealth's exhibit O.

Q. All right, Detective Brown, also on April 25th at the same time you were talking to the defendant about the Stone case, the Stroud case and the Soloman case, could you tell us whether or not after having been advised of his constitutional rights, in Commonwealth exhibit number six, if the defendant gave statements concerning two grand larcenies of automobiles?

A. Yes, sir, he did.

Q. Do you have those statements? Is this one of the statements the defendant gave?

A. Yes, sir, it is.

Q. And he had been advised of his constitutional rights [600] in exhibit number six. Is that correct?

A. Yes, sir, he had.

Q. Would you read that statement, please?

A. "My name is Terry Williams. I am thirty-one years old. I have been advised of my rights and I have signed a waiver of my rights and make the following statement of my own free will with no threats or promises having been made to me. I took a car from Riverside Center. It was parked in the parking lot of the movies there. I took the car and parked it over near Church Street. The car had a vinyl top, it was blue in color. This was back around the first of the year. I threw the keys away to it. Detective T. A. Brown has read this statement back to me and it is true and correct to the best of my knowledge. Signed, Terry Williams."

Q. I would also like to show you this statement and ask you if this was also a statement that the defendant gave you in regard to another automobile?

A. Yes, sir, it was.

Q. Would you read that statement?

[601] A. "My name is Terry Williams and I am thirty-one years old. I have a seventh grade education. I have been advised of my rights, and I have signed a waiver of my rights and I make the following statement of my own free will with no threats or promises having been made to me. I stole a white Ford car from the Holiday Inn. It had a black top. I parked it over next to the cemetery in the project. I have been asked about a Colt 45 beer can in the car. It was already there. And I have been asked about a pack of Merit cigarettes in there also. These was also already in the car, but I smoked some of them. I took the keys and threw them away. I have been read this statement back to me by Detective T. A. Brown, and it is true and correct to the best of my knowledge. Signed, Terry Williams."

MR. FULLER: I would like to introduce these two statements into the evidence.

JUDGE INGRAM: All right, they will be marked as Commonwealth's exhibits P and Q.

[602] Q. All right, Detective Brown, in going through the police records and so forth were these two cars designated as stolen cars?

A. Yes, sir, they were.

Q. Was the defendant tried and convicted on these charges later?

A. Yes, sir, he was.

MR. FULLER: I would like to introduce into the evidence the conviction record of the defendant as to the two grand larcenies. That right there indicates that there were two indictments.

JUDGE INGRAM: All right, that will be Commonwealth's exhibit R.

Q. Detective Brown, I believe also on August the 26th of this year, which was last month, the defendant was charged with arson. Is that correct?

A. Yes, sir.

Q. In the city jail?

A. Yes, sir.

MR. FULLER: I would like to introduce into the evidence, if your Honor, please [603] the court order convicting the defendant of arson.

JUDGE INGRAM: All right, that will be marked as Commonwealth's exhibit S.

Q. The defendant was convicted last Wednesday?

A. Yes, sir.

Q. This arson charge took place on August the 26th in the jail?

A. Yes, sir.

Q. Now, Detective Brown, on May the 2nd at the time you talked with the defendant, after having advised

him of his constitutional rights as indicated by Commonwealth's exhibit number twelve, the defendant, you've already testified I think to the jury that the defendant told you which of his two statements, April 25th and April 28th, was true. Is that correct?

A. Yes, sir.

Q. And which one did he say it was?

A. The first statement on April 25th, 1986.

Q. All right, and then he gave you some additional information about the murder of Harris Thomas Stone. Is that correct?

[604] A. Yes, sir.

Q. You have already testified that he told you that he threw the wallet over the Worsham Street bridge?

A. Yes, sir.

Q. Did he say anything else on that occasion?

A. Yes, sir.

Q. What, if anything, else did he say?

A. He made numerous statements, that his mother told him that he was dreaming, having nightmares. He stated that he had blood on his hands and shoes, and he said that he had on white pants and a black shirt. His mother told him that he did not have blood on his clothes. This was when we was talking to him about Alberta Stroud. He said that he was sorry, that he did everything and wished he had not done it. He said that he did not know who he was anymore. He said that it

seemed like when someone did something to him, that he wanted to get them, and something would just come over him. He said that he wanted to just choke some of the guys in the jail cell, and one day some had gone to the library and one guy was laying on the bed, and he got the [605] urge to just go over and choke him. Another time he was playing cards and he thought he could just hit someone and break that person's jaw without him ever knowing what hit him. He said that if someone or something was on t.v. that he liked or that he was doing something that he was okay, but when he was alone and the lights and t.v. was off, that all he could do was think about the things that he has done and that he was bothered by this. He said that he falls asleep thinking about his and often dreams about it. He said that he was with a guy named Joe Joe riding around when he sold the .357 gun. Joe Joe lives somewhere in the Java area. He is a friend of his wife, and his wife's name is Jenny Childress Williams and she lives in Java. She and Terry have not lived together in about nine years. He said he got $100.00 for the gun.

Q. All right, that's all I have.

CROSS EXAMINATION

By Mr. Motley:

Q. Detective Brown, concerning the two automobiles, [606] I believe you testified as to the statements last in the defendant's trial on those charges. Is that right?

A. Yes, sir, it is.

Q. And to the best of your knowledge I believe the evidence showed that both of those cars were returned to their owners undamaged. Is that correct?

A. Yes, sir.

Q. And was Terry Williams cooperative with you in telling you about those automobile thefts?

A. Yes, sir, he was.

Q. And did the information he gave you about them appear to be true and correct?

A. Yes, sir.

Q. Did he appear to the remorseful about being involved in those thefts?

A. He said he was sorry for everything he had done.

Q. He said he was sorry for everything he had done. And as far as all of these interviews that you had with him, has he made the statement from time to time that he had something come over him, or something like that?

A. Yes, sir.

[607] Q. Has been able to explain to you what he means when he says that?

A. No, sir.

Q. And I believe there would be times on several of these offenses where he would say deny something and then come back later and admit it. Is that right?

A. The only time that he made a denial was on the 28th of April when he talked to Detective Evans, and I wasn't present.

Q. Right. But what I'm asking you, he recanted some statements that he gave. He came back two days later I think, several days later, on May the 2nd, and said, "Let me tell you what is really the truth, what really happened." Is that right?

A. When we interviewed him again, and at that time he reiterated that what he had originally told us was the truth.

Q. Right. Thank you. I have no other questions.

RE-DIRECT EXAMINATION

By Mr. Fuller:

Q. Detective Brown, he retracted what he told you on the 25th. Is that right?

[608] A. Yes, sir.

Q. And you went back to him on May 2nd and asked him again?

A. Yes, sir. I went to him. He did not ask for me.

Q. That's all.

MR. MOTLEY: Nothing further.

. . . .

DR. MILLER M. RYANS, who had previously testified as a witness on behalf of the Commonwealth, was recalled

as a witness on behalf of the Commonwealth, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Fuller:

Q. Would you state your name to the Court and jury, please?

A. My name is Dr. Miller M. Ryans.

Q. Dr. Ryans, what type of doctor are you?

A. I am a forensic psychiatrist.

Q. And what does a forensic psychiatrist mean?

A. We are concerned primarily with cases of a criminal nature. We determined competency of a patient to testify in court, and if they are not competent, we treat them until they are.

[609] Q. Dr. Ryans, would you state what your qualifications are?

MR. MOTLEY: Your, Honor, I will stipulate his qualifications as an expert.

JUDGE INGRAM: All right, sir. All right, Mr. Fuller you may proceed to examine Dr. Ryans as a forensic psychiatrist.

MR. FULLER: As an expert?

JUDGE INGRAM: Yes, sir.

MR. FULLER: All right, sir.

Q. Dr. Ryans, did you have an occasion to see the defendant, Terry Williams?

A. Yes, I did.

Q. When did you first see him?

A. He was admitted to the forensic unit of Central State Hospital on July the 29th, 1986.

Q. Had he been seen by any members of your staff before that time?

A. Yes. He was seen by our psychologist, Dr. Arthur Centor.

Q. And I believe that was in June. Is that correct?

A. That is correct.

Q. And did you have access to that information?

[610] A. Yes.

Q. All right, and how long did he stay in Central State?

A. He was admitted on July the 29th 1986 and was discharged on August the 11th, 1986.

Q. Dr. Ryans, were you able to determine, based upon your examinations and evaluations, as to whether or not the defendant was competent to stand trial in this case?

A. Yes, I did.

Q. And what was your evaluation?

A. It was my opinion that Mr. Williams was competent to plead and participate in the legal process and assist his attorney in his defense.

Q. All right, did you reach a conclusion as to whether or not he had any emotional or mental problems?

A. Yes we did.

Q. What was that conclusion?

A. He did not have any mentally or emotional problems. He was functioning on borderline level of intellectual functioning, which is between mild mental retardation and low normal intellectual level.

Q. But at that particular rate, I believe his I.Q. [611] was around seventy-five, would he be competent to understand the proceedings and intelligently and knowingly waive his constitutional rights?

A. Yes.

Q. And what level would it take so when a person wouldn't be able to do that?

A. I would say anywhere from mile mental retardation on down.

Q. And what I.Q. level would that be?

A. That would be below seventy.

Q. Below seventy?

A. Yes.

Q. All right, now but his I.Q. was such that he understood the nature of the proceedings. It that correct?

A. That is correct.

Q. All right, and you said he was not suffering from any mental illness?

A. No, sir, he was not.

Q. All right, and could you tell us whether or not he was suffering from any irresistible impulses?

A. No, sir, he was not.

Q. Dr. Ryans, were you able to make an evaluation [612] as to whether or not he was competent to stand trial?

A. Yes, we did.

Q. And what was that evaluation?

A. It was our evaluation that he was competent to stand trial.

Q. He was not suffering from any mental illness?

A. No, he was not.

Q. Did you determine whether or not he was hallucinating?

A. Yes, we determined that he was not.

Q. Did he indicate to you that he was hallucinating?

A. No, he did not say to us that he was hallucinating. He did say that he had exceptional powers to determine something, to see something in a dream that has passed, that had already happened and give details of it.

Q. All right, did this . . . How did you evaluate that?

A. Well, we found that it had nothing to do with our evaluation for competency.

Q. It had nothing to do with whether the was mentally ill?

A. It had nothing to do with mental illness.

[613] Q. He showed no signs of mental illness?

A. He did not.

Q. Now, Dr. Ryans, have you had an opportunity to study the defendant's past record as far as criminal activity is concerned?

A. Yes.

Q. And what, if anything, have you studied?

A. Well, I was particularly interested in the fact that he had an armed robbery charge that he was convicted on previously.

Q. All right, and any other specific incidences that you paid particular attention to?

A. No, I focused on the armed robbery.

Q. All right, did you read his statement concerning the malicious wounding charge against the defendant involving a seventy some years old lady?

A. Yes, I did.

Q. Are you aware of her condition?

A. Yes, I understand that she is in serious condition.

Q. All right, and based upon your evaluation of the armed robbery, and the malicious wounding and the

other charges, are you able to reach a conclusion as to the possibility, or lack of possibility, [614] or probability, or lack of probability of future dangerousness on the part of the defendant?

A. Yes, I have made a conclusion.

Q. What is your conclusion?

A. It is my opinion that there is a high probability that he would commit criminal acts of violence, and that he constitutes a continuing threat, a serious threat to society.

Q. That's all I have. Answer counsel's questions.

CROSS EXAMINATION

By Mr. Motley:

Q. Dr. Ryans, when was the last time that you examined Terry Williams?

A. August the 11th, 1986.

Q. Have you talked with him since that time?

A. No, I have not.

Q. Have you sat down and talked with him about these other cases and any convictions in them?

A. No, I have not.

Q. Dr. Ryans, I'm assuming that you had access to certain items of evidence, which included the defendant's statements given the police and things of that sort, in various cases?

[615] A. Yes, that is correct.

Q. And in those did you see any signs of wanting to clear his conscience or even having a conscience about things that had happened?

A. Yes.

Q. And could you elaborate on that?

A. Well, it would be my opinion that the fact that he brought the subject up after the fact that the deceased was thought to die of natural causes, and to me that would indicate that he did have a conscience and had guilt [sic] feelings about it.

Q. You are aware that his statement was voluntary, that it was something he came to the police about, not vice versa?

A. Yes.

Q. And you are also aware, I assume that it caused really a closed file to be reopened and a new investigation begun that would not have been made otherwise?

A. That is correct, sir.

Q. And I think you also are aware that he gave statements not only about that offense, but also about the Stroud beating and the automobile larcenies?

[616] A. That is correct.

Q. And are you aware also that his remarks, particularly as to the automobile larcenies, required the investigating detective, Mr. Brown, to have to go get out old missing automobile files just to see what he was talking about? Are you aware of that?

A. That is correct. Yes, I am.

Q. And do you also recall Mr. Williams making statements that at times something comes over him, he isn't sure what, but something comes over him?

A. Yes.

Q. What did you attach to that?

A. It would indicate that mostly [sic] likely under stress he would resort to instead of constructive acting out behavior, he would resort uncontrolled, poor impulse behavioral acting out.

Q. In other words, doing things that were wrong or might hurt other people?

A. Yes, in a violent manner.

Q. And then he would tell about it later on?

A. That is correct.

Q. And feel guilty about it?

[617] A. Yes.

Q. Dr. Ryans, I know that you are being called on for a professional opinion, but really you're having to make some estimate or even speculation as to how this man might behave in the future?

A. That is correct.

Q. No other questions.

RE-DIRECT EXAMINATION

By Mr. Fuller:

Q. Dr. Ryans, when this stomething [sic] comes over the defendant, you say he acts under stress. He knows the difference between right and wrong does he not?

A. Yes, he does.

Q. Therefore, he's not mentally ill?

A. That is correct.

Q. And he's not acting from an irresistible impulse, so he does have control over his actions doesn't he?

A. That is correct.

Q. But he does them anyway?

A. Yes.

Q. That's all.

[618] RE-CROSS EXAMINATION

By Mr. Motley:

Q. And then, Dr. Ryans, I believe his conscience comes into play afterwards. Is that right?

A. Yes, afterwards.

Q. But it's still there?

A. Yes.

Q. Thank you. No other questions.

RE-RE-DIRECT EXAMINATION

By Mr. Fuller:

Q. Based on your records and your discovery, even though his conscience comes into play afterwards, he does it again?

A. Yes.

Q. That's all.

MR. MOTLEY: No other questions.

. . . .

DR. ARTHUR CENTOR, who had previously testified as a witness on behalf of the Commonwealth, was recalled as a witness on behalf of the Commonwealth, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Fuller:

Q. Would you state your name to the Court and jury, [619] please?

A. Arthur Centor, C-e-n-t-o-r.

Q. Dr. Centor, what is your occupation?

A. I am a clinical psychologist at the forensic unit in Central State Hospital in Petersburg, Virginia.

Q. All right, Dr. Centor, how long have you worked for the State of Virginia?

A. Well, for the State of Virginia I started in 1954, that's thirty-two years ago. I didn't work all of the time for the . . .

Q. You haven't been there continuously for all of that time have you?

A. No, not continuously, no. Eight years I did not work for the state.

Q. And during this period of time you have testified on many occasions throughout the State of Virginia and also here in Danville as an expert as far as forensic, clinical psychology is concerned?

A. Issues relating to psychology and the law, yes, sir.

Q. Right.

MR. FULLER: Do you have any objections to Dr. Centor's qualifications?

MR. MOTLEY: No. The defense is well [620] familiar with Dr. Centor and has no objection to his being qualified as a forensic psychologist.

Q. Dr. Centor, when did you first see the defendant, Terry Williams?

A. In June of this year, June the 27th actually. I saw him for two hours and forty-five minutes then.

Q. And what else did you do?

A. I tested him on that date for two hours and ten minutes.

Q. All right, and what did your testing reveal?

A. Well, there were issues at that particular time that I was requested to answer. And one was his competency to plead and stand trial and assist in his own defense. And the other was whether he was competent at the time of the alleged crimes, which he was charged with at that time.

Q. All right, and based upon your interviews and testing, what was your conclusion as to his competency to stand trial?

A. My opinion was that he was compent [sic] to plead and stand trial, and that he did not lack substantial capacity to understand the proceedings against [621] him or to assist in his own defense.

Q. What did you determine to be his understanding of the proceedings against him?

A. I did question him about his understnading [sic] of the knowledge of the rolls and functions of the various participants in the courtroom procedure, such as, "Who is your defense attorney? What does he do? Who is the Commonwealth's Attoeney? [sic] What does he do? Who is the Judge? What does the Judge do? How many are there in a jury? What does a jury do?" Rolls and functions of various participants in courtroom procedures. And he had a good understand [sic] of those issues. I also questioned him about his knowledge of the various pleas and their consequences, guilty, not guilty, and not guilty by reason of insanity, and what happens if somebody is found guilty, guilty and so on. He had a good understanding of those issues. I then questioned him about his knowledge of plea bargaining and appeal, which is a little bit more complicated. He was a little bit weak about plea

bargaining, but he understood what appeal was. So overall he had a good understanding [622] of the knowledge of courtroom procedures.

Q. All right, Dr. Centor, could you tell us what your evaluation was as to whether the defendant knew the difference between right and wrong or whether he was mentally ill?

A. There was psychological testing that took place and psychological as well as the interviews indicated that he was not suffering from any mental illness or mental defect and that at the time of the alleged crimes for which he was being examined at that time, he did not show any defect of reason due to defect of the mind or defect of the mind so as not to know the nature, the character or the consequences of his acts or the difference between right and wrong. And furthermore, on the basis of the tests and the interview, I determined that he was not suffering from a loss of volition or willpower due to disease of the mind or defect of the mind at the time of the alleged crimes.

Q. In other words, he had control over his volition.

A. Yes. Yes. There was no loss of volition or willpower at that time. He was not suffering [623] from any irresistible impulse.

Q. All right. Dr. Centor, did your testing and your interview with the defendant show any conflicts or any inconsistencies?

A. No, there were none. If just showed no signs of mental illness or mental defect. Now he claimed . . .

Q. That's what I mean is, if what he claimed show any conflict or inconsistency with your testing?

A. Yes. Well, that is there was no conflict in my findings, but he claimed that he was hearing voices and that he was having visual hallucinations too. But there are certain tests for these people who claim to hear voices and people who claim to see things that are not there, and on both of these tests showed that his claim was not substantiated or that it was not true, that his claim was not one that was based on reality. He had also made some claim that things came over him over which he had no control, and he was given apart from the psychological tests and the psychological interviews, he was also given a neurological [624] examination where a neurologist examines him to see if there is any defect in his nervous system. He also received two brain waves, one of them administered just normally, but one very special one with a sleep deprived. That is the person is kept up all night and then the brain wave is taken the next morning, and that's very sensitive and there to normal brain wave, normal neurological, normal sleep deprived E.E.G., so that from all tests that we were able to feel were relevant, he showed no disorder.

Q. All right, so what would your conclusion be as to what he claimed and what the testing indicated?

A. Well, the testing so far as his claim of the having oratory or visual hallucinations of hearing voices and seeing things, was found to be malingered. That was not true, just claiming that, but it was not true. The claim that things came over him and that he was not able to explain were not substantiated by psychological testing or the

other tests, such as neurological examination and brain wave. So that that too was not substantiated.

[625] Q. Dr. Centor, besides the interview and testing you did on June 27th, did you have an occasion to see and evaluate the defendant on another occasion?

A. I did have occasion to see him briefly on July 29th of this year, but I then did an extensive interview on August the 7th for one hour, on August the 8th for one hour and fifteen minutes, and I administered a psychological test on August the 8th for twenty minutes.

Q. And the defendant from July 29th until August the 11th was at your hospital. Is that correct? As an in patient.

A. He was an in patient on that occasion. That is correct.

Q. All right, and did you have an occasion to interview and evaluate the defendant at a later date, in September?

A. Yes, I did. And that date was September the 9th for one hour and thirty minutes.

Q. Was that here in the Danville city jail?

A. Yes, it was.

Q. Was that after the arson charge?

[626] A. That is correct.

Q. All right, now based upon all these interviews and examinations are your conclusions the same as what you've just testified to?

A. That is correct.

Q. No change?

A. There has been no change. That's right.

Q. He knew the difference between right and wrong and is not suffering from an irresistible impulse?

A. That is correct.

Q. And he is competent to understand these proceedings?

A. That is correct.

Q. Dr. Centor, have you also had an opportunity to evaluate, study and evaluate, the defendant's prior record, history and record?

A. Yes, sir.

Q. And that evaluation of his history and prior record would among other things include what? That are some of the things it included?

A. Well, his adjustment in terms of any history that he has with difficulty with the law, alcohol and drug habits, working habits and so on. Among the various charges that he had, time spent in [627] incarceration and the actual nature of the offenses and so on.

Q. What was the nature of some of the offenses?

A. Beginning with not the juvenile, but the adult . . .

Q. No, just his adult.

A. Adult, of . . . the earliest one when he was about twenty, as an adult or twenty-one, was an armed robbery,

and he served time in the penitentiary for that. The one after that was a breaking and entering for which he served time in the penitentiary. The one he just got out, my understanding he got out in April of '85 from the penitentiary he was released on parole. And not long thereafter at least the first event he got into was seven months after that, which is the murder charge. A month after that a car theft, a month after that a car theft, a month after that was the malicious wounding. And more recently is the arson charge.

Q. Are you familiar with the facts and circumstance involving those cases?

A. Yes, sir.

Q. And based upon his history which you have studied [628] and these prior charges and so forth, could you tell us whether or not you have been able to form an opinion as to whether or not the defendant poses any future threat to society?

A. Yes, I have.

Q. All right, and tell us what that is and what you based your opinion on?

A. It is my opinion that the defendant, Mr. Williams, shows a high probability of committing criminal acts of violence that would constitute a continuing serious threat to society, based on the history, some of which I have given here, my evaluation, the nature of the offenses, the frequency of the offenses too. When one has two violent criminal acts in such a short period of time,

this enhances the probability of future criminal acts of violence.

Q. Thank you, Dr. Centor. Would you answer counsel's questions?

CROSS EXAMINATION

By Mr. Motley:

Q. Dr. Centor, when was the last time you talked to Terry Williams?

[629] A. September the 9th.

Q. September the 9th. And this was during the course of your last evaluation of him?

A. That is correct.

Q. Have you talked with him about his past record and some of these other cases?

A. Yes, sir.

Q. What has he told you about the older offenses, like for example, this 1976 robbery case that he was involved in and the 1982 break in?

A. The 1976 offense, he says that I believe it was his younger, or juvenile brother-in-law, told him where he could get some money, and he went with a gun, though it was unloaded he claimed, he went to this individual and got the money from this individual. Then the young brother-in-law then told somebody and he was apprehended, and in order to keep this youngster from having to do time he took all of the blame on himself. That's what he told me.

Q. Now, of course, you are also aware of and you've reviewed some of the evidence in the Stroud case, the beating?

[630] A. Yes, sir.

Q. And also the Harris Stone case, this homicide?

A. Also, that's right.

Q. I believe you've reviewed all of the statements he gave in those cases to the police?

A. That's right.

Q. And did you see any kind of indications of guilt or guilty conscience in any of those statements?

A. It would appear to me that the thought of his actions on those occasions was bothering him. That's the only explanation.

Q. As far as you can see, it was the only explanation?

A. It's the only rational explanation that I can come up with.

Q. That he was having a guilty conscience, and he was having problems with it, and he wanted to get it off his chest?

A. Well, it was a combination of guilty manifested by disturbed dreams that he was having at night. That is the guilt was manifested by his having nightmares.

Q. It was bothering him that much?

A. Yes, sir.

[631] Q. Thank you. No other questions.

RE-DIRECT EXAMINATION

By Mr. Fuller:

Q. But he kept doing these things didn't he?

A. The . . . From his release from the penitentiary until his time of his statement was one year. In this period he was doing it after having been returned to the penitentiary, or having been there two times, still in a very short period of time he committed these acts.

Q. That's all I have.

MR. MOTLEY: Nothing further of the doctor.

. . . .

DETECTIVE C. D. EVANS, who had previously testified as a witness on behalf of the commonwealth, was recalled as a witness on behalf of the commonwealth, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Fuller:

Q. You've already been sworn. Is that correct?

A. Yes, sir.

Q. State your name again, please.

[632] A. Detective C. D. Evans.

Q. Detective Evans, when did the incident involving Mr. Soloman occur?

A. December the 4th, 1985.

Q. Last year?

A. Yes, sir.

Q. All right, and at the time you first talked to the defendant, Terry Williams, he was already in the Danville city jail?

A. Yes, sir.

Q. Unrelated charges?

A. Yes, sir.

Q. That's all.

MR. MOTLEY: No questions.

* * *

[634] DIRECT EXAMINATION

By Mr. Fuller:

Q. Would you state your name to the Court, please?

A. Dr. James D. Sprinkle.

Q. Dr. Sprinkle, you are a surgeon. Is that correct?

A. That's correct.

MR. FULLER: All right, Mr. Motley, do you want me to go through his qualifications?

MR. MOTLEY: No. I'm familiar with Dr. Sprinkle's qualifications, and I'll stipulate his as an expert in his field.

MR. FULLER: All right.

JUDGE INGRAM: All right.

Q. Dr. Sprinkle, did you have an occasion to treat Alberta Stroud on the night of March the 5th, 1986?

A. I did.

Q. Tell us what condition she was in, when you saw her?

A. She was brought in by the rescue squad, reportedly having had a blood pressure of sixty . . . in shock . . . they applied mast trousers – those are compression trousers to keep the blood pressure up as well as possible. She was intubated by the [635] emergency room physician, Dr. Dunn, and airway was established. A peritoneal tap was done and gross blood was coming out of that tap, so therefore, I took her to surgery.

Q. All right, and what was the result of what you found?

A. The findings at the operating table were: a ruptured spleen, which was bleeding, a laceration of the left commoniliac vein, which was bleeding, bleeding from the right ovarian vein, so these were the three immediate things that were taken care of. The spleen was removed. The left common iliac vein was repaired, and the right ovarian vein was just simply tied off. There were multiple lacerations of the small bowel, which ultimately required a resection of about four inches of the mid-small bowel

and two inches of the lower bowel, and re-anastomosis. There was disruption the rectal sheath, in the left lower quadrant of the abdomen, that being the facial structure surrounding the main muscle, in that area. That was repaired at the time of closure of the incision.

Q. All right, Dr. Sorinkle, what could have caused [636] these type injuries?

A. Trauma.

Q. Some trauma. And would it all have been in one area, or . . .

A. That's uncertain. Obviously there was trauma to the left quadrant of the abdomen, where the rectal sheath was disrupted, that's for certain. Other than that, I can't say.

Q. All right, did she have any other injuries for which someone else treated her?

A. Yes.

Q. And where were they?

A. Head injuries.

Q. And I believe she was treated by Dr. Whitten for that?

A. That's correct.

Q. Your concern that night was the area that you have described, and you took her to surgery and removed her spleen and repaired the other areas. Is that correct?

A. That's correct.

Q. All right, and you treated her, I assume, through the post-operative period of time, and then turn [637] over to whom?

A. Well, she had renal shutdown the next day. Therefore, the nephrology group was called, Dr. Moore and those people. Subsequently therefore, they were writing most of the orders, but ultimately she was transferred to Dr. Perry just for general care.

Q. So you were . . . more or less released her, or did not treat her anymore after she recovered from the . . . the area that you performed the surgery on?

A. Basically true, yes.

Q. Okay. All right, answer Mr. Motley, if you will.

CROSS EXAMINATION

By Mr. Motley:

Q. Dr. Sprinkle, when was the last time that you examined Mrs. Stroud?

A. I don't know for certain on that, to be honest with you. Somewhere late in her hospitalization she was transferred to Dr. Perry, and I confined my examinations to the abdomen basically.

Q. And this was basically about the time that she came in and you performed surgery on her?

A. Yeah, that's correct. I performed surgery on her. [638] Yes, but I just checked her abdomen, her incision, you know, as she went along, to make sure it healed properly.

Q. Uh-huh, I see. Did that heal properly?

A. Yes, it did.

Q. And did she have . . . I know you mentioned that she had renal shutdown the next day after surgery, but from the emergency surgery that you performed when she came in, to the best of your knowledge, has she recovered from that?

A. Yes.

Q. Has she made a satisfactory recovery?

A. From the abdominal surgery, yes.

Q. Are you in a position to give a prognosis?

A. From the abdominal surgery?

A. Yes, sir.

A. The emergency situations have been corrected.

Q. Thank you. I have no other questions.

MR. FULLER: All right, thank you very much, Dr. Sprinkle.

. . . .

The tape recorded testimony of DR. PAUL A. MANSHEIM who had testified in Chambers with the Court, all [639] counsel and the defendant present, and which was stipulated to be made a part of the record as testimony on behalf of the defendant, was then played in open court, which was as follows: DR. PAUL A. MANSHEIM, a witness called on behalf of the defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Motley:

Q. All right, Dr. Mansheim, just to get this into the record, you are Dr Paul A. Mansheim, M.D.?

A. Yes.

Q. And you are engaged in the practice of psychiatry in Tidewater, Virginia?

A. That's right.

Q. I believe it's already been stipulated that you are a forensic psychiatrist and . . .

MR. FULLER: If you want me to, Mr. Motley I will stipulate his qualifications as a forensic psychiatrist.

MR. MOTLEY: All right, thank you.

MR. FULLER: If you want to go through them though, that's fine.

[640] MR. MOTLEY: Well, I have his C.V. that we could maybe make an exhibit in the case if we had to.

MR. FULLER: That's all right with me too.

JUDGE INGRAM: All right.

Q. Dr. Mansheim, I believe pursuant to an order of this court you examined Mr. Terry Williams, the defendant. Is that right?

A. That's true.

Q. And as part of the examination I think you also examined him as to the possibility of factors in mitigation regarding these offenses. Is that correct?

A. Yes, that's right.

Q. And what was the . . . . Well, let me phrase the question this way. Did you have a discussion with Mr. Williams concerning this part of your examination?

A. Yes.

Q. And what were some of the things he told you about that you consider significant?

A. He said that when he was charged with an armed [641] robbery in 1976 he took some bullets out of a gun that was used in order to make sure that no one was injured during that episode. And he felt that was significant because it was a way in which he had tried to act to make sure no one got hurt.

Q. You say he said he took the bullets out of the gun to make sure that no one would get hurt?

A. Yes.

Q. Did you have any discussion with anyone other than the defendant about that crime?

A. No.

Q. Did he volunteer this information to you?

A. Yes.

Q. Thank you, Dr. Mansheim. I have no other questions. There's just one other question, Dr. Mansheim, excuse me. Was there an offense in 1982 that Mr. Williams discussed with you?

A. Yes, there was.

Q. Could you tell us about that?

A. Yes. Mr. Williams said that in 1982 he was arrested for breaking and entering and also for grand larceny stemming from the same incident. And with respect to the issue of mitigation, he [642] said that he felt that he had been unfairly convicted because he was simply helping a friend move some furniture and he felt that that would be something that I should know about in the process of making an opinion about mitigating factors.

Q. He felt like there was a situation where he was wrongly convicted of that offense?

A. Right, and if people felt that he had been fairly convicted when he was wrongly convicted, then they might get the impression that his history was worse than it appears to him to be.

Q. Did he volunteer this information to you also?

A. Yes, he did.

Q. Thank you. I have no other questions.

JUDGE INGRAM: All right, Mr. Fuller?

CROSS EXAMINATION

By Mr. Fuller:

Q. Dr. Mansheim, the only thing you know about his allegations that he took the bullets out of the pistol was what he told you?

A. That is correct.

Q. You haven't talked to the investigating officers [643] or anyone involved in the case?

A. That is correct.

Q. And whether he did or did not take the bullets out of the pistol, you don't know of your own knowledge?

A. That is correct.

Q. All right, and this 1982 incident involving the burglary and grand larceny, did he tell you that he was caught while he was in this house, and that the owner of the house came and confronted him, and that he fought the owner?

A. He told me everything up to the point of fighting the owner.

Q. He didn't tell you about that?

A. No, I didn't know about that.

Q. And that they had all of the merchandise stacked up right at the front door, and when the owner came in and asked them what they were doing, they tried to get away and he and the owner had a pretty long confrontation?

A. I know they had a discussion, that there was a misunderstanding, but I didn't know there was a physical fight.

[644] Q. You didn't know that they fought out of the house, off of the front porch and out in the yard?

A. No, I didn't know that.

Q. All right, that's all.

RE-DIRECT EXAMINATION

By Mr. Motley:

Q. I have one or two more questions. Dr. Mansheim, did the defendant appear to be cooperative?

A. Yes.

Q. Did he seem to be sincere in what he was telling you?

A. Yes.

Q. I have no other questions.

. . . .

DOROTHY MOORE, the next witness called on behalf of the defendant, having been duly sworn, testified as follow.

DIRECT EXAMINATION

By Mr. Smitherman:

Q. Ms. Moore, please state your name.

A. Dorothy Moore.

Q. Where do you live, Ms. Moore?

A. 1312 Myrtle Avenue.

Q. Do you know the defendant, Terry Williams?

[645] A. Yes, I do.

Q. Do you know he's been convicted of capital murder?

A. Yes.

Q. Ms. Moore, how long have you known Mr. Williams?

A. Since '81.

Q. Since 1981? And what do you know about Mr. Williams? How do you know him?

A. Well, the only thing I've known, he's, you know, quiet and respectable, 'cause he's always had a lot of respect for me.

Q. Okay. How do you know him? What's your relationship with him?

A. He used to date my foster daughter.

Q. Did you have any . . . You say he was very respectful to you. Did your daughter indicate that he was in any way but respectful to her?

A. No.

Q. Have you ever seen him to be violent toward any person.

A. No.

Q. What do you do, Ms. Moore?

A. I'm a minister.

Q. Where is you ministry?

A. (Name of church not audible) Holiness Church.

[646] Q. Have you ever had contact with Mr. Williams due to this ministry?

A. Yes, I have.

Q. How.

Q. I have talked to him in person and by phone and I also wrote him a letter.

Q. About what?

A. Well, I talked to him about, you know, getting saved or getting in the church and stuff like that.

Q. Has he been in your home?

A. Yes, he has.

Q. How did he act in your home?

A. He acted, like I said, very respectable, you know, towards me and the family.

Q. Have you ever known him to be violent to anyone?

A. I've never even heard him say a bad word.

Q. Have you ever been worried about your daughter.

A. No.

Q. . . . when she was dating him?

A. No.

Q. How did you feel when you found out about this offense?

A. Well, I was just amazed because it didn't sound [647] something he would do, you know, what I knew of him.

Q. That's all of my questions. Answer Mr. Fuller's questions.

CROSS EXAMINATION

By Mr. Fuller:

Q. Ms. Moore, Did you know he had been convicted of armed robbery in 1976?

A. Well, I didn't know him back then.

Q. You first knew him in 1981?

A. Uh-huh.

Q. That was right after he got out of the penitentiary for the armed robbery? Is that right?

A. Well, I didn't know about the armed robbery.

Q. Well, did you know that the next year, in 1982, he was convicted of burglary and grand larceny and sent back to the penitentiary?

A. Yes.

Q. So you really didn't get to know him very long because he wasn't here very long was he?

A. Well, I, you know, met him then, because we lived right next door to his mother.

Q. To his mother. Did you live on Henry Street at the time?

[648] A. Yes.

Q. I see. And you met him in '81 and in '82 he got sentenced to the penitentiary for I believe eleven years. Is that right?

A. I don't recall how long it was, but I knew he was sent.

Q. All right, and then did you know him any when he came back in 1985?

A. Yes, because even when he was in there I talked to him several times.

Q. While he was in the penitentiary?

A. Um-huh.

Q. And then he came back in '85. Right? Somewhere along in that period of time. Right?

A. Yes.

Q. And you say you are surprised to hear about the fact that he has been convicted of murdering Harris Thomas Stone?

A. Yes.

Q. Have you also heard that he has been convicted of the malicious wounding of Alberta Stroud?

A. Yes.

Q. That's all I have.

[649] MR. SMITHERMAN: That's all.

. . . .

DEBORAH GRANT, the next witness called on behalf of the defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Smitherman:

Q. State your name for the Court.

A. Huh?

Q. State your name for the court.

A. Deborah Grant.

Q. Where do you live, Ms. Grant?

A. On Levelton Street.

Q. On what?

A. On Levelton Street.

Q. How far is that from Henry Street?

A. All the way across the bridge.

Q. Do you know Terry Williams, the defendant?

A. Um-huh.

Q. How long have you known him?

A. I've known him about eleven years.

Q. And in those eleven years, have you seen him a lot?

A. Um-huh.

[650] Q. What's your relationship with him?

A. Just friends.

Q. You've never dated him. Right?

A. Um-huh.

Q. But you're a good friend of his?

A. Um-huh.

Q. Ms. Grant, in your friendship with Mr. Williams has he ever . . . what's he been like?

A. He's always been nice to me.

Q. He's always been nice to you?

A. Um-huh.

Q. Have you ever been afraid of him?

A. Huh-uh.

Q. Have you ever seen him do anything in your presence that would . . . to other people or anything?

A. No.

Q. Has he ever been violent to anybody?

A. No.

Q. That you know of?

A. No.

Q. You know that he was convicted back in 1976 of armed robbery.

A. I've read about it.

[651] Q. Okay. You know that he went to prison there for awhile. Right?

A. Yes.

Q. Did you know him when he came back?

A. Yes.

Q. How many times a week did you see him?

A. Right often.

Q. Okay. During that time, was there any indication that he was violent or anything like that?

A. No.

Q. Was there any indication that . . . anyting [sic] that made you scared of him?

A. No.

Q. Did he make anybody else scared of him while you were in his presence?

A. No.

Q. You know he went to prison again in '82?

A. I read about it.

Q. And he was gone for awhile?

A. Uh-huh.

Q. And he came back in '85. Did you know him then.

A. Yes.

Q. Were you friends with him then?

[652] A. Yes.

Q. Was there any indication at all that he was violent?

A. No.

Q. Any indication that he was (would) in any way hurt anybody or anything like that?

A. No.

Q. Now you know about this offense and the offense . . . of the malicious wounding offense?

A. Yes.

Q. On West Green Street. You know about that one?

A. I've read about it.

Q. How did you feel when you heard about that?

A. Shock.

Q. Why?

A. Because he don't seem like the type of person that would do something like that.

Q. What type of person is he?

A. He's nice, a respectable person. He's always been good to me.

Q. No other questions. Answer Mr. Fuller's questions.

CROSS EXAMINATION

By Mr. Fuller:

[653] Q. Ms. Grant, you really haven't had that much contact with Mr. Williams over the eleven years have you?

A. Just friends.

Q. Well, he went to the penitentiary in 1976 didn't he?

A. Um-huh.

Q. And he got out in four years, 1980. Right?

A. Right.

Q. Then he went back to the penitentiary again in 1982. Right?

A. Right.

Q. He got out in 1985?

A. Right.

Q. So the eleven years you knew him, he was in the penitentiary for seven of them anyway. Right?

A. I guess.

Q. Well, armed robbery is a violent crime isn't it?

A. Yes.

Q. And you say you read about his lady that was maliciously wounded on Green Street?

A. Yes.

Q. But it hadn't been in the paper.

A. I read something about it in the paper.

Q. There may have been something in the paper about [654] her but there wasn't anything in the paper about Mr. Williams committing that offense?

A. No.

Q. But you have to agree that that was a pretty violent offense wouldn't you?

A. Yes.

Q. She was badly beaten?

A. Yes.

Q. And also the murder of Mr. Stone was a violent offense wasn't it?

A. Yes.

Q. That's all I have

MR. SMITHERMAN: That's all the questions I have.

. . . .

LULU WILLIAMS, the next witness called on behalf of the defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Smitherman:

Q. State your name for the Court.

A. My name (is) Lulu Williams, Terry Williams' mother.

Q. Mrs. Williams, you've been in the court oom all day [655] haven't you?

A. Yes.

Q. You've heard everything that's been said about your son?

A. Sure.

Q. Terry's been at home when he's not been in prison hasn't he?

A. Sure.

Q. What's he like at home?

A. He's a nice boy at home.

Q. Has he ever hurt anybody in your presence?

A. No.

Q. Has he ever threatened anybody in your presence?

A. No.

Q. What, if anything, has he ever done to you?

A. Not anything. He always when I'd tell him to do anything, he does it.

Q. Where do you live?

A. 202 Henry Street, 202 Henry Street.

Q. Henry Street, 202 Henry Street? And you've been there how long?

A. '74.

Q. Since '74.

[656] A. Right.

Q. And Terry's been with you whenever he's not been in prison?

A. Right.

Q. What do you do, Mrs. Williams?

A. I work at Dibrell Tobacco Factory every season, and when I'm not working there I work for Cunningham and Hughes.

Q. What's that?

A. The undertaker shop.

Q. What?

A. The undertaker shop, Cunningham and Hughes.

Q. Excuse me, I didn't understand you.

A. Right.

Q. What about Terry? Has he worked recently?

A. Not really. He did have a job working on the railroad when he first got out, you know, this last time.

Q. What happened?

A. Well, he was laid off. He got his leg hurt, and then he went back after he went to the hospital and got treated and everything. He stayed out about a week. Then he returned back to work, and [657] they let him work about a week I think, and then they laid him off.

Q. You know that he didn't get fired did he?

A. Not to my knowledge.

Q. He worked for who?

A. I don't know his name.

Q. You don't know the name of the railroad? You said it was a railroad though. Right?

A. Right.

Q. Mrs. Williams, when . . . how much schooling did your son have?

A. I believe he had . . . I don't know now, it's been so long.

Q. Did he graduate from high school?

A. No, he didn't graduate.

Q. He quit before he graduated?

A. Right.

Q. Has he been at home since then?

A. Sure. No more . . . He married. He married though then him and his wife . . . He stayed with his wife awhile and then . . . Nawh, he married and came home to live with us.

Q. Uh-huh.

[658] A. Then they went back to his wife's house and some way of another they separated.

Q. They separated a while back though, before you moved to Henry Street?

A. Huh-uh.

Q. Okay, afterwards?

A. Afterwards.

Q. Mrs. Williams, you said he was good around the house. Has anyone ever told you that your son was violent toward them?

A. No.

Q. That they were scared of him?

A. No.

Q. Have you got any reports on Terry's bad behavior from other people?

A. No.

Q. You know he's been in prison?

A. Sure, I know that.

Q. You know about the armed robbery?

A. Right.

Q. And the other convictions he's had?

A. Right.

Q. Did the armed robbery surprise you?

[659] A. Sure it did.

Q. What about the . . . When you heard about these latest offenses, what did you think?

A. Well, I didn't believe it. I just couldn't believe it when he called me and told . . . I just couldn't believe it. It didn't look like it was in him, and I know he didn't act like it was in him.

Q. Did you ever find any clothes that were bloodied?

A. No, I didn't find any clothes that were bloody. He asked me did I have any blood on one night or day one. I didn't pay any attention about, you know, about it. I hadn't heard nothing or nothing like that, but I ain't seen no blood nowhere, you know.

Q. When you heard it you couldn't believe it. Right.

A. (To which the witness nodded her head in the affirmative.)

Q. Because you couldn't believe it. Did you tell him he was dreaming?

A. I sho did. He must have been dreaming, because I don't believe he did nothing like that.

Q. You just couldn't believe it.

A. I just couldn't believe it.

[660] Q. Why?

A. Because I know he just . . . couldn't believe it because he minded me and everything at home. I just, I don't know.

Q. Do you think he's a danger to other people now?

A. No, I don't think so.

Q. Why not?

A. Because I don't believe it.

Q. Has Terry ever had any problems emotionally?

A. Well, he fell out the school house when he was small. Well, you know, Grasty School?

Q. Um-huh.

A. I don't know whether you know it or not, but when he was seven or eight years old he just fell off on top of his head. And so we asked him, you know, "Do you want to go to the emergency room?" And he said, "I'm all right right now," or something like that. So we didn't pay it no more mind. So and then from then on we just didn't think no more about it, until I believe now that boy still needs help. I declare I do. It's something wrong.

Q. He's just not himself is he?

[661] A. Huh-uh.

Q. That's all the questions.

CROSS EXAMINATION

By Mr. Fuller:

Q. Mrs. Williams, you say he fell off a building. He went to the hospital, and they teated [sic] him and released him. He wasn't even admitted to the hospital was he?

A. No. They didn't carry him to no hospital. They didn't carry him to no hospital.

Q. They didn't take him to the emergency room?

A. No. They didn't carry him to no hospital. They didn't carry him to no hospital.

Q. They didn't take him to the emergency room?

A. No.

Q. They didn't?

A. No.

Q. All right, so he didn't even have to go to the hospital?

A. He said, "I'm all right." That's what he said.

Q. You don't believe he did any of these things that he's been found guilty of do you?

A. Well, I don't believe he would have did it, but you know, he done did it, you know. So there ain't . . . I don't know what to say, you know.

Q. All right, that's all. I don't have anything else.

* * *

[668] The jury then returned to the courtroom, and were read its instruction granted by the Court.

JUDGE INGRAM: Ladies and gentlemen, that is your further instruction of the Court. The Commonwealth has agreed to waive its opening argument, therefore, counsel for the defendant will argue first. The Commonwealth will have the occasion to give the final closing argument. Mr. Motley?

MR. MOTLEY: Thank you, your Honor. May it please the Court, ladies and gentlemen of the jury, I know we've all had a long day and I'll try not to make it much longer for you. I appreciate all of your patience so far. You are going to hear a number of cases this term. You've probably heard some other jury cases already. When October rolls [669] around next week – well, it rolls around this week, it rolls around tomorrow – you will be hearing some civil cases as well. I doubt that you will ever hear a case during your jury service that is as serious or weighty as this case. A man's life is on the line, and you realize that, and have been instructed by the Court that this has been a capital case from the very beginning. Both of us have a right tough job tonight. I don't know which side of the jury box it's easier or harder to be on. We've got a very difficult job tonight. When you've got to determine whether Terry Williams here receives the death penalty or a life sentence, that's going to be a difficult task. I have the very difficult task of trying to persuade you to bring back a life sentence instead of the death penalty. Law school was right rigorous. It was three years of hard work. There are a lot of things they don't teach you. One of the main things they don't teach you is how to get up in front of a jury and argue [670] to spare a man's life. I'd like to talk with you for just a few minutes and tell you why I think Terry Williams' life is worth saving. Ladies and gentlemen, Terry Williams would not win a personality contest. I doubt seriously that he is going to win any civic club man of the year award. I doubt very seriously where you are going to pick up The Register or The Bee and read where he's been awarded a humanitarian award, or community service award or

anything of that sort. Terry Williams has not been a good citizen. He has not been someone that Danville would be proud to claim as one of its native sons. I'll admit that; there's no denying that Mr. Williams has got admittedly a long history of landing on the wrong side of the law. You've heard about that this afternoon during the part of this trial where the Commonwealth puts on its evidence as far as what the sentence should be and we put on our evidence. You heard that he had a 1976 armed robbery conviction. [671] You also heard that he was convicted in 1982 of breaking into someone's home and stealing some property. You also heard about some other recent things that he's gotten in trouble for, two automobile thefts, and a very brutal incident involving Mrs. Alberta Stroud, something that may be in a way worse than this murder trial. You've heard about all of these things. Ladies and gentlemen, I can't condone it. I can't tell you to look the other way. I can't tell you to close your eyes to them or to be like an ostrich and stick your head in the sand, and say, "They aren't there." They are there. They are before you; they are a part of the permanent record on file in the Clerk's Office down the hall here. There is nothing that I can do or even would ask you to do to ignore that. You can't. It's there. And that, of course, has to come into play, be factored in when you sit down and fix the sentence for this man. And I will admit too that it is very difficult to ask you to show mercy to a man [672] who maybe has not shown much mercy himself. I doubt very seriously that he thought much about mercy when he was in Mr. Stone's bedroom that night with him. I doubt very seriously that he had mercy very highly on his mind when he was walking along West Green and the incident

with Alberta Stroud. I doubt very seriously that he had mercy on his mind when he took two cars that didn't belong to him. Admittedly it is very difficult to get us and ask that you give this man mercy when he has shown so little of it himself. But I would ask that you would. And I can't give you any logic or great earth shattering, moving reason why you should if you press pressed me. If you really pushed me, I would be hard pressed to give you a good, logical explanation because these things defy logic. We grew up and from childhood we want to believe that for everything in the world there is a logical explanation. We go to school and learn that there are logical explanations for why things work the way they do, why we have [673] weather, why we have electricity, why we have all kinds of things science (one word not audible), why our economic system, our government system works the way it does. We like to think that there is a logical, good, concise explanation for everything. Ladies and gentlemen, there is – there are – a lot of things that can be logically explained. Mr. Williams' treatment of Harris Stone defies logic; his treatment of Mrs. Stroud defies logic. Oh, yes, he can say he wanted some money when he was being mean. Maybe that is an answer; maybe it isn't, because Terry Williams, ladies and gentlemen, is a complicated person. As I said, he wouldn't win any personality contest. I don't know what makes him tick. I don't know what makes him do the things he does. I don't know why he gets in trouble. He's got a very loving, compassionate mother. I'm sure it broke her heart to get up there on the witness stand today and all but beg you to spare his life. He apparently came from a home where there was a mother who believed in things like

hard work and [674] respect for other people, not hurting people. She couldn't give you any logical explanation of why it happened. She didn't want to believe it. That's a natural reaction. It's like the old saying about a baseball scandal years ago. "Say is ain't so, Judge. Say it ain't so." That's probably the way Mrs. Williams felt up here on the stand today. She didn't want to say it was so; she did not want to believe it was so. It hurt her too badly. Ladies and gentlemen, Terry Williams is a complicated soul. He has done these things. Doctors have checked him out, some of the best psychiatric minds in the state. Dr. Mansheim from Virginia Beach has got a list of professional qualifications two pages long, about the same with Dr. Cantor and Dr. Evans. They are experts in their field. And a lot of us who are in the criminal justice system rely very heavily upon these doctors, both in prosecuting cases and defending them. They are top drawer doctors. They couldn't find anything wrong with Terry Williams mentally. They checked him out and they couldn't find [675] any organic mental illness. They couldn't find schizophrenia, or depression, or psychosis or other mental afflictions. They were consistent in that. Ladies and gentlemen, there is one other thing that they consistently found too. They found a heart. They found conscience. They found a feeling in this man if he could admit he had done some pretty horrible things and feel bad about it. I've always like to believe, or at least convince myself, that if someone came forward and admitted their misdeeds, would receive some kind of favorable consideration. I think you had that in this case of Terry Williams. He's told the doctors that he feels bad about these things, that he doesn't know what's come over him at times. He

has by that indicated that he's got a heart; he's got a conscience. Yes, he can distinguish right from wrong. Yes, he'll keep going back and doing wrong, but he will still feel remorseful and still feel terrible about it afterwards. That is supported and corroborated by other evidence [676] in this case too. You have his statements. Ladies and gentlemen, his statements are everything in this case. His statements which he gave the police voluntarily cleaned up a whole stack of closed files in the Danville Police Department, files that the police department had probably given up some hope of solving on some, not even realizing that there was a crime on others, especially Harris Stone's death. The police would not have gotten this information but for one man, Terry Williams. Terry Williams was the author of his own misfortune in these cases. He was the one that really blew the whistle on himself. Oh, yes, there was evidence that he came back and said, "Look, I want to retract my statements. I want to take these confessions back. I didn't do it. They are nightmares. They are just not right." Ladies and gentlemen, he came back in shortly afterwards and said, "I want to set the record straight. I want to tell you the truth. I did these things." Officer Brown and Officer Evans both testified at length [677] about that. Both of them considered him to be sincerely, and candid and truthful about what he was telling them. He came in and admitted that he had done wrong. As I said, he solved a stack of unsolved cases, including a battery, two batteries, Alberta Stroud and Harris Stone. Ladies and gentlemen, I think you can see this man has a conscience. All right, he's committed these things, and all right, he needs to be punished. I'm not denying that. I'm not saying – don't

punish him. I'm not saying put him back on the streets where he can get out and hurt somebody else or cause somebody else grief or anguish. I'm not saying let him go scott free. I am saying let's spare his life; let's lock him up; let's put him away; let's give him a light sentence; let's get him off the streets; let's get him out of town; let's put him someplace where he's going to be behind concrete, and steel and razor wire, but let's let him live, choose life. Ladies and gentlemen, I don't know that I have said anything really to persuade you. I didn't plan [678] on having to come up with an overwhelming or great piece of oratory at this time of night. I'm sorry if I can't deliver something along the lines of McArthur's old soldiers and Churchill's blood, sweat and tears. But I want to just talk with you, like I said, and tell you why I think his life should be spared. Ladies and gentlemen, the Commonwealth waived its opening argument. They still have their rebuttal and they are going to get in the last say. Mr. Smitherman is going to make a few remarks. Ladies and gentlemen, again I would just respectfully direct you to all those things in his statements and the things he told the police officers where he said, "Yes, I did it, and I need to set the record straight. I need to tell you what happened and to get this off of my chest and do what's right." He's done that much. He's volunteered all of this. Ladies and gentlemen, I'd ask that you prevent him from being a further danger to society, but I'd ask that you do that by sending him to life imprisonment rather than [679] taking his life. Thank you.

JUDGE INGRAM: Mr. Smitherman?

MR. SMITHERMAN: Thank you, your Honor. Ladies and gentlemen of the jury, I would argue all night

if I could convince you what to do with this person who has been convicted of a felony. This man has been convicted of a moral crime. He's been convicted of several other various crimes. I can't defend those. I think they are horrible. I think they're utterly stupid and horrible. However, I'm going to urge you, to see if I can convince you that Mr. Williams has a right to live even though he's done these horrible crimes. You have two choices, life imprisonment or death. That's the only two choices you have. A life sentence, telling Mr. Williams that's he's going to jail for the rest of his life. That's horrible punishment, terrible punishment, the rest of your life you're going to be in jail, or you're going to die in the electric chair. The Court read you an instruction and told you that you had this choice. It said [680] that you had to decide whether the Commonwealth has proved future dangerousness. There's a code, future dangerousness, in our code, meaning that Mr. Williams would be dangerous in the future, would hurt somebody in the future. And that evidence, we presented evidence that he had not had any problems at home, and many of his friends, a number of his friends, did not see any dangerousness in him. But he's got this horrible list of felonies. Even if you do find that the Commonwealth has shown that Mr. Williams is a danger to society and will be in the future, it doesn't mean you have to sentence him to the electric chair. Even if he is shown to be the most dangerous person in the world, he doesn't have to go to the electric chair. The law allows you to decide between the two, life or death. Even if he's shown to be worse than Charles Manson. They want you to consider the entire evidence, all the evidence in the case. And of course the Commonwealth is going to

emphasize the horrible crimes that he's committed. And they [681] are. I can't even begin to tell you how horrible I think both of the crimes that have been brought up the most, the murder and the brutal beating on West Green Street. But consider the punishment, the two worst things that could happen to a person, locked up for the rest of his life or sentenced to death. A life sentence means he is away from the public for the rest of his life. The public's safer, he will there be seen . . .

MR. FULLER: If your Honor, please, I would just like to take the jury out for just a minute.

JUDGE INGRAM: All right, let's take the jury out for a minute.

The jury retired to the jury room, and with the Court, all counsel and the defendant remaining in the courtroom, the following occurred:

MR. FULLER: If your Honor, please, I just don't think that's a fair argument to say that a life sentence means that he will be gone for the rest of his [682] life. And counsel knows that he'll be eligible for parole in about twelve and a half years, and that the Commonwealth can't argue that. I just think it's unfair. I think he can argue, you know, that a sentence of life is a sentence of life, but I don't think he can argue that he'll never be out.

MR. SMITHERMAN: Your Honor, I didn't argue that. I stated they are sentencing him to life imprisonment, . . .

MR. FULLER: You said that he never . . .

MR. SMITHERMAN: . . . that they will be sentencing him to never getting out. And that's . . .

MR. FULLER: That right, exactly.

MR. SMITHERMAN: And that's exactly what they're sentencing him to.

MR. FULLER: Well, that's not true and you know it.

MR. SMITHERMAN: But that's exactly what they're sentencing him to, and he's not eli . . . and whether you are

* * *

[684] The jury returned to the courtroom, and Mr. Smitherman's argument on behalf of the defendant continued as follows:

MR. SMITHERMAN: Ladies and gentlemen of the jury, again, you have a choice between a life sentence or death. You must consider which sentence to give him. Now we're not asking you to reward Mr. Williams. A life sentence isn't a reward; the death penalty certainly isn't. However, we would like you to consider in considering the present offense, as Mr. Motley pointed out before, that Mr. Williams went to the police and told the police that he had done these things. Now again, we're not asking you for any rewards, but certainly there has to be some consideration for honesty, that this man did go to the police and voluntarily state this, made these statements. He was not caught even so far. These crimes are the worst, but that has to be some consideration in [685] your mind because otherwise these crimes wouldn't be solved, Mr. Williams wouldn't be sitting here. Now I have

told Mr. Williams all along that his statements were dumb, and now the defendant is convicted of them. But sometimes conscience is more – whatever you call it – can be dumb practically. Mr. Williams stands before you for sentencing. He wishes you to consider all of the evidence. Again the Commonwealth will emphasize consider all of his past record. It's terrible. But also consider that this man turned himself in, not on one crime but on four. Four unsolved crimes he turned himself in on, that the Commonwealth and the police department would have probably never solved, would not have solved, or it had not solved. I don't know if they ever would have solved them, but had not been solved. He assisted them by saying those things. Ladies and gentlemen of the jury, again I would go on all night if I thought I could convince you. It probably would have been better if I hadn't said anything. But my client, Terry Williams, [686] is asking you through me to consider that he wishes to live. Again, he doesn't deserve any rewards, but life imprisonment is not an award, and he does deserve some consideration. Thank you.

JUDGE INGRAM: Mr. Fuller?

MR. FULLER: Ladies and gentlemen of the jury, certainly I recognize the difficulty of your job. We all have a duty to perform, the defense attorneys, my office, you as citizens who comprise this jury. We'd all rather not be here. Mr. Stone would like to be alive and Mrs. Stroud would like to be a human being instead of a vegetable, but because of the defendant's malicious, vicious and dastardly acts we are here tonight. Now counsel has asked you to believe because the defendant, they say, has a conscience has confessed to these crimes, that that

should be justification to spare his life. He can admit what he did. And he did admit what he did, but that's not unusual. We have a lot of people that deserve and [687] get the ultimate punishment that admit what they did. Of course the defendant found that after he said that he did wished he hadn't, and he retracted it all three days later, he said it was a dream. The detectives testified that on May the 2nd he then admitted that what he had said on April the 25th was true and that what he had said on April the 28th, in which he alleged was a dream, which was what his mother and brother told him, he wouldn't give another written statement or a recorded statement to the police. So you know, he didn't a hundred percent open his conscience up and say, look, I did all of this, I want to be punished for it, I'm sorry. He retracted it. He retracted it because he doesn't want to suffer the consequences of his acts. And also we know from his record that he's not going to quit, absolutely not. And as counsel argued a minute ago, he said he went to the police voluntarily, he wasn't caught, he gave himself up. Of course he was already in [688] jail for something else. It's not like he completely gave himself up. We kind of had him you know, down in the basement. He did write a letter to the police chief, but he didn't sign it. But the detectives charged with investigating this case knew of Terry Williams, and when they found out he was in I block they went directly to him because of the Soloman case. And he denied to them that he wrote this anonymous letter until they more or less proved to him that he did. Then he gave all of these statements on April the 25th. He said he wanted to get it off his conscience. That was commendable. But then three days later he retracted

it all and said it was nothing but a dream, absolutely nothing but a dream. Then he wouldn't give another written or recorded statement. The last written statement that he gave he denied all of this, it was a dream he has a conscience, he feels remorse later they say, but his remorse doesn't do his victims any good does it? [689] It doesn't bring back Mr. Stone; it doesn't make a human being out of Mrs. Stroud, and he doesn't stop doing it. He keeps right on, and on and on. Counsel says, "We're not saying don't punish him," but a few hours ago counsel was arguing that the other people going through the Stone house could have stolen the wallet, that the Commonwealth didn't prove beyond a reasonable doubt the cause of death. Of course you rejected all of that and you found the defendant guilty of murdering Mr. Stone in the commission of robbery. So this business of saying, oh, we're not saying don't punish him, that's now, it wasn't a few hours ago.

MR. SMITHERMAN: Your Honor, I'll object to that. That's a improper argument.

MR. FULLER: I don't think it's improper argument.

MR. MOTLEY: It's two separate stages of the case.

MR. FULLER: That's all right, I can by [690] the history of the case.

JUDGE INGRAM: All right, I think that's a proper argument.

MR. SMITHERMAN: Note our exception, your Honor.

JUDGE INGRAM: All right.

MR. FULLER: Now we come to the punishment stage and counsel suggested that you spare the defendant's life, that you give him life because they say he wants to live. He wishes to live. So did his victims. So did his victims. Ladies and gentlemen, listen, if you will, to the Commonwealth's case proving that the defendant represents a future danger to society. In 1976 he was convicted of armed robbery. The exhibit introduced before you indicates that he got eight years. We know that in 1982 he was out, and we know that on September the 7th, 1982 he was caught by Donald Holland in his mother and daddy's house on South Street. He and another thief had broken into the house, taken out practically the window by taking out an air conditioner, had all type [691] of valuables right in front of the door they were planning to cart off, took Mr. Holland's father's retirement watch given to him by P. Lorrilard, took his mother's wedding ring, neither of which they never got back. Mr. Holland confronted them. He had to fight from his front door, down the steps, out in the yard to restrain the defendant. He had to fight to protect what was left of his parents' property. And what did the defendant tell the psychiatrist, Dr. Manheim? He told him that he was wrongly accused of that offense, that he was just in the house getting some of the belongings of what he thought was somebody else's. Can you believe? How can you believe this so called remorse, and this conscience when he tells such a bare faced lie? Mr. Holland told you that they took the air conditioner out, almost took the window out to get in. Now how in the world do you think you have a right to go in a house and take things when you've

got to take the window out almost to get in? And that's what he'd [692] have you believe. That's what he told the psychiatrist. Mr. Holland had to fight him all the way out of the house to protect his parents' property, and even then they didn't get it all back. We know, according to the Commonwealth's exhibits, that he received eleven years for that offense. We know he was out in 1985. First armed robbery in 1976 and then in 1982 burglary and grand larceny, and eleven year sentence and he's out in 1985. On November the 2nd of 1985 we know from the evidence you have heard today that he went over to Mr. Stone's house about 11:00 o'clock on that night, he asked Mr. Stone, who was under the influence of alcohol, for some money. When Mr. Stone refused to give it to him, what did he do? He first goes in the kitchen and sees about getting a butcher knife. Then he decides to use a mattock. He takes the mattock, he crushes Mr. Stone's ribs, they puncture his lungs, they fill up with blood. He then, while the man is gasping for his last breaths, robs him of his possessions, [693] the produce of Mr. Stone's labor. He said he only got three dollars. We don't know whether there was three or more, but it doesn't make a bit of difference the amount. He killed a man; he murdered a man over a hundred and ninety-four dollars or three dollars, as he said, three dollars. What kind of viciousness is it that would take a man's life for three dollars? It shows you how dangerous this man is. And then while the man was gasping for breath he walks off and goes to the Cabaret for some enjoyment. A conscience? Does that sound like a conscience to you? That's cold bloodied, vicious murder. And this man is left there to strangle to death on his own blood while he goes to the

Cabaret. Does that end it? On December the 4th he goes into Mr. Soloman's house, he sets his clothes on fire. Mr. Soloman opens the door and he goes in, he gets a knife, he stabs Mr. Soloman and then takes his money. Conscience? What good is a conscience if you keep on doing these things? Two psychiatrists [694] testified that he had control over himself, that he knew the difference between right and wrong and that he was not suffering from irrestible impulse. He knew exactly what he was doing. But when he wanted something he was going to take it. If a person said anything he didn't like, or did anything he didn't like, or wouldn't give him what he wanted, that person was in trouble. We know that from Mr. Stone. He had asked Mr. Stone for money, Mr. Stone wouldn't give it to him, he killed him. He wanted some money from Mr. Soloman, so he sets his clothes on fire, and he stabs him and then he takes his money. That was in December, a month and two days after he killed Mr. Stone. Then in February he takes a couple of cars. Then on March the 5th he sees poor Alberta Stroud walking up Main Street. A seventy-five or six year old woman. She told him and told Mr. Stamps that somebody had taken her money that day. She wants to go to Pine Street. He says, "I'll show you." Instead of taking her to [695] Pine Street, he takes up to Holbrook, he turned left and then they go down on West Green Street, which used to be down behind the old George Washington High School and later the Robert E. Lee High School. And what did he do? He said she said some things he didn't like. She said something he didn't like. And because of that what does he do? He beats her to a pulp. He said five times, "I kicked her, I beat her, I kicked her, I beat her, I kicked her, I beat her, I kicked her,

I beat her, I kicked her, I beat her." And beat her he did. He left her with brain damage, all kind of internal injuries that required some surgery that night. The doctors did all they could to save her life, and miraculously they did. But what did they save? She's got brain damage. Both Dr. Whitten and Dr. Perry, her attending physician, say she's a vegetable, her condition is poor, she will not get any better. For all practical purposes he killed her. She's a vegetable. Ladies and gentlemen, he's done [696] all of this since he killed Mr. Stone. Conscience? If this man has got a conscience, we're all in trouble. Is that the end of it? He's been convicted of arson since he's been in jail, last month, August 26th. He's not going to stop. And what else did he tell the detectives? He said it seemed like when someone did something to him, he wanted to get them, something would just come over him. I'll tell you what it was that came over him, meanness. He said he'd see some of the guys down in the jail cell and sometimes he'd just want to choke them. On another occasion he said he saw a guy lying on the bed and he just had an urge to choke him. That's now. We're dealing with a dangerous person, and the fact that he's a dangerous person, besides his past record, is certainly indicated by the testimony of a clinical psychologist and a forensic psychiatrist. Here's what Dr. Ryans said about him. Dr. Ryans says, "There is a high probability that the defendant would commit other serious crimes and that he [697] constitutes a serious threat to society." Dr. Centor testified. Both of these men testified that he was competent, he knew the difference between right and wrong, and he had control over his actions. In fact, Dr. Centor testified that this business of him saying he heard voices

and these dreams and so forth was nothing but malingering. In other words, he's faking. He knows what he's doing. He knows exactly what he's doing. He's asking you to spare him. That's not what he did with his victims. He said things came over him, but none of these things that came over him was substantiated by psychological testing, nor were they substantiated by physical neurological testing, no brain damage. And what did Dr. Centor say about his treat [sic] to society? He said there was a high probability of him committing violent acts which constitute a threat to society. He said that one of the main reasons he reached that conclusion was because he had committed at least two violent crimes in such a short time that that increases the probability of future [698] violent acts. Think about it. November the 2nd, Mr. Stone. December the 4th, Mr. Soloman. March the 5th, Mrs. Stroud. I mean November, December, March, three people. One of them is dead, another one is a vegetable. For all practical purposes she's dead. That's how he left her. Do you really think a man has a conscience who could leave Mr. Stone gasping for breath, and while Mr. Stone was gasping for breath he robs him, takes the produce of Mr. Stone's labor. Mr. Stone was a working man. He was a construction worker. He worked hard for his money. While he's gasping for his last breaths the defendant robs him, walks off, goes to the Cabaret and has a good time. Poor Mrs. Stroud said something, we don't know what, that he didn't like, so he beat her to a pulp. I mean he kicked her and he beat her, and he kicked her and he beat her about her stomach and about her head, and he left her to die. He just walked off and left her to die. A conscience? We think not. We think the evidence indicates

that this man didn't have a conscience. [699] For whatever reason he told the officers, he retracted that. Ladies and gentlemen, society deserves to be protected from someone like this. When this case started yesterday you were all asked the question, if under the proper circumstances you could administer the death penalty. You all answered that you could. We submit, based upon the evidence in the Stone case, what you've heard about this man's future dangerousness, not only the crimes that he's committed, and what the psychiatrists have had to say, that the best way society can be protected from this man is to give him the death penalty. And we say that not because we get any pleasure out of arguing a case like this. It would be so much better if none of us had to deal with such matters, but we do. And we submit that this is a proper case because it would be hard to find a case ever where you are going to see a series of more violent acts over such a short period of time. You think about it. In a ten year period of time, and you've [700] got to substract [sic] the years he spent in the penitentiary, 1976 armed robbery, 1982 burglary and grand larceny, where one of the victims had to fight the defendant to hold him. He was in the penitentiary from 1982 to '85, and he comes out and within months he's killed Mr. Stone, he's stabbed Mr. Soloman, he's made a vegetable out of Mrs. Stroud, and he's committed arson. That coupled with the expert testimony of a psychologist and a psychiatrist that say this man has a high probability of future dangerousness and he constitutes a continuing threat to society. We submit that it would be hard to find a case where there was more compelling evidence and convincing evidence of future dangerousness, and that the best way society

can be protected from this person is to administer the death penalty, and we feel like the facts and circumstances of this case plus the other evidence you've heard justifies that results. These victims cry out for justice, and we submit that the only way justice can prevail is for [701] this man to be given the death penalty. His crimes merit it, his future dangerousness cry out for it. The police have done the best they can with these cases. They have marshaled the evidence. I've introduced the evidence. Now you represent the last link in the chain of justice. Your duty is not an easy one. But we ask you to consider all of the evidence, all of the possibilities of future dangerousness. Think about the victims. They are always forgotten. They are crying out for mercy for the defendant, but how about the victims? They deserve some consideration. They had a right to live just as much as he did. You are not being asked to take the defendant's life. He forfeited his life when he took the life of Mr. Stone and ruined the life of Mrs. Stroud. And we think that is you consider all of these elements that you will feel that the Commonwealth has proven beyond a reasonable doubt the future dangerousness of the defendant and that he deserves the maximum punishment.

* * *

Circuit Court for the City of Danville

[Caption Omitted In Printing]

JURY VERDICT FORM

We, the Jury, on the issue joined, having found the defendant, Terry Williams, guilty of the willful, deliberate and premeditated murder of Harris Thomas Stone in the commission of robbery, while armed with a deadly weapon, and that after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

/s/ Illegible
Foreman

We, the jury, on the issue joined, having found the defendant, Terry Williams, guilty of the willful, deliberate and premeditated murder of Harris Thomas Stone in the commission of robbery, while armed with a deadly weapon, and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

_____
Foreman

Circuit Court for the City of Danville

[Caption Omitted In Printing]

Transcript of Sentencing Hearing

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[3] UPON THE CONVENING OF COURT at 9:06 o'clock A. M., on the morning of November 19, 1986, the cases of Terry Williams, #1, 2, 3, 4 and 5, being numbers one hundred eighty-two, one hundred eighty-three, one hundred eighty-four, one hundred eighty-five and one hundred eighty-six on the docket, were called for a Sentencing Hearing, and both the Commonwealth and the defendant announced themselves as ready, and the Court Reporter was duly sworn.

* * *

THE COURT: All right, let the record show the defendant, Terry Williams, is present in the courtroom, with his attorneys, Mr. Motley and Mr. Smitherman. Also the attorney for the Commonwealth and the probation and parole officer who prepared the pre-sentence reports, in these cases. Mr. Motley, have you had an opportunity to review the pre-sentence report in the cases involved in the grand larcenies, the malicious wounding and the arson, and have you and Mr. Smitherman had an opportunity to review the pre-sentence report relative to the capital murder and robbery offenses?

MR. MOTLEY: Yes sir. Both . . . both reports have been reviewed with the defendant. I don't know of anything that needs to be made, as far as a correction or an addition. As far as the part of each report that deals

with Mr. Williams' prior employment history, he [4] indicated to me that as far as his job at the M. A. Stewart Construction Company, he was laid off following a knee injury, that he sustained on the job, and that was the circumstance for his leaving that particular employment. Otherwise, I think both reports are in good order.

THE COURT: All right, the pre-sentence report will be marked as Commonwealth's A, in each of the cases. All right gentlemen, do you have any evidence you care to present?

MR. MOTLEY: None from the defense, sir.

* * *

[21] THE COURT: All right, Mr. Williams, on the conviction of grand larceny, under Indictment No. 1, the Court sentences you to six years in the penitentiary. On Indictment No. 2, for grand larceny of the automobile, the Court sentences you to six additional years. Mr. Williams on the malicious wounding of Alberta Carter Stroud, the Court is of the opinion that for that offense, you should receive the maximum punishment of twenty years in the penitentiary. I think that the evidence in that case establishes beyond any doubt that that was a totally unwarranted, merciless beating, and that certainly the maximum punishment is warranted, upon that conviction. Upon your conviction of arson, as charged in Indictment No. 5, the Court sentences you to one additional year in the penitentiary. The matter then becomes as to what is the appropriate sentence on the capital murder, which you were tried and convicted by a jury, on September the 30th, and at which time the jury returned a

verdict, after having found you guilty of the wilful, deliberate and [22] premeditated murder of Harris Thomas Stone, in the commission of robbery, while armed with a deadly weapon . . . found that after consideration of your prior history, that there is a probability that you would commit criminal acts of violence, that would constitute a continuing serious threat to society in the future . . . they made that determination after having considered the evidence in mitigation of the offense. That jury unanimously fixed your punishment at death, after considering all those factors and being convinced beyond a reasonable doubt that that was the proper verdict in the case. Accordingly, the Court thereafter ordered a post-sentence report, in accordance with Code of Virginia, Section 19.2-264.4. The Court has considered that post-sentence report, Mr. Williams, and of course, it contains a great deal of criminal history, which I think that no one could ignore. As a juvenile, it included ten felony offenses . . . it contains evidence that upon your attaining adulthood, that you were convicted of a petit larceny offense, and served a long jail sentence for that, but was placed on probation. While you were on probation, you committed an armed robbery and were sent to the penitentiary. After serving a portion of that sentence, you were paroled, and while again out, you began to get yourself involved in further criminal activity. In this Court, in 1983, you were again [23] sentenced to the penitentiary, upon convictions of burglary and grand larceny, and thereafter paroled to this jurisdiction, in 1985. While you were on parole, from that time, you have been found guilty of petit larceny, the two grand larcenies for which the Court has just sentenced you, the additional offenses of malicious

wounding, and arson, which occurred after this, as well as the capital murder and the robbery of Harris Thomas Stone. The Court is, therefore, of the opinion that the post-sentence report indicates that the sentence which has been imposed upon you, by the jury, was both appropriate and just. It appears that the jury was certainly justified and correct, in finding that there is a probability that you would commit crimes of a serious nature, because you have a history of traditionally doing that. After the capital murder involved, there are at least two other violent crimes, which you were involved, not to mention the other things that have occurred thereafter. Therefore, it's the judgment of the Court, taking all these matters into consideration, that the death penalty which the jury recommended in its verdict of July the 30th (September), is appropriate . . . it's proper . . . it's just . . . it is the punishment which should be imposed. Accordingly, it's the judgment of the Court that upon the conviction and finding of the recommendation of the jury, in the [24] capital murder case, the Court does sentence you to the death penalty for this offense. In accordance with the Code of Virginia, Section 53.1-232, the Court shall set the execution for May the 1st, 1987. Of course, the Court has previously imposed the seven years on the robbery, at the time of the sentencing.

MR. FULLER: I just . . . I think you said July the 30th, but it was September.

MR. MOTLEY: Yes sir.

THE COURT: Excuse me . . . September the 30th. Mr. Williams, the Court is of the opinion that the sentences which the Court has just imposed upon you,

are justified and warranted, predicated on your criminal history. For a man thirty-one years, you have amassed a substantial criminal record, and not only involving many crimes . . . involving property, but crimes against the person, including that of rendering one person into a state of unconsciousness, for life, and the taking of a life of another. Therefore, the Court is of the opinion, the sentence is proper. It is just. It is appropriate, in this case.

* * *

Circuit Court for the City of Danville

[Caption Omitted In Printing]

Transcript of State Habeas Trial

* * *

[16] EVERETT L. MOTLEY, JR. Was called as a witness, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. POWERS:

Q Mr. Motley, could you spell your name for the court reporter, please?

A My full name is Everett, E V E R E T T L. Motley, Jr. I have always gone by E. L.

Q And Mr. Motley, are you appearing today pursuant to a subpoena?

A Yes, which I understand was issued by the petitioner.

Q And did that subpoena ask you to produce certain documents from your file?

[17] A Everything I have except for some duplicate copies of briefs and transcripts, which I assume you already have, is right here with me.

MR. POWERS: Your Honor, could I approach the witness and look at those materials?

THE COURT: Yes.

Q Mr. Motley, are you taking any medication today?

A No.

Q And is there any physical or mental impairment that would impede your participation in this proceeding and your full testimony?

A No.

Q I would like to just get on the record some background questions. What is your present address?

A 11024 Foresttrace Way, Glen Allen, Virginia.

Q Is that in the Richmond area?

A Yes, it is in Richmond, in Henrico County.

Q And by whom are you presently employed?

A I am employed by General American Corporation of Pittsburgh, Pennsylvania.

[18] Q What are your job duties with that company?

A I am a title underwriter for them with the Richmond, Virginia office. I am a title insurance agent, and I handle real estate title underwriting matters.

Q How long have you been located in Richmond?

A Five years in October.

Q And before that, aside from law school or college, you were born and raised in Danville?

A That is correct.

Q Are you presently practicing law?

A No.

Q And when did you cease practicing law, Mr. Motley?

A 1989.

Q And the reason?

A I had several major health problems, led to some professional problems also, and I got out of the active private practice of law in 1989.

Q And is your license to practice law in a status of indefinite suspension?

A I am still on disability status.

Q And has it been indefinitely suspended [19] by order of the state bar?

A Yes, until I apply for reinstatement.

Q Now you are a 1979 graduate of the University of Richmond law school?

A That is correct.

Q And when you after graduating from law school returned to Danville, did you join a firm?

A Yes.

Q What was the name of that firm?

A Meade, Tate and Daniel.

Q And how long did your association with that firm last?

A I was with them approximately two years, and I had also clerked for them when I was in law school.

Q What happened after your two-year tenure with that firm?

A I went into private practice on my own.

Q Was that solo practice?

A Yes.

Q And that was for the period of 1981 to 1989?

A That is correct.

Q As a solo practitioner, did you have any full time support staff such as a receptionist or [20] secretary?

A No one full time, no, sir.

Q How did you handle your filing, typing, and things of that nature?

A Well a number of things I had to do myself. I had some people that helped me part time, no one full time. And my wife also helped me when she could. A lot of it I just had to do on my own.

Q During the period that you were in solo practice, what portion of your work was the result of court appointment?

A Probably about – it varied. It would normally run anywhere from twenty-five to fifty percent.

MR. POWERS: Your Honor, I would request that Mr. Motley be considered an adverse witness under the Virginia Code so I can ask leading questions. Is that permissible?

THE COURT: All right, I think that is appropriate.

Q Mr. Motley, when were you appointed to represent Terry Williams?

A I don't recall exactly; there was an order entered.

[21] Q would that be, does July 8, 1986 sound right?

A If that is what is on the order.

Q Would you agree that you represented him not only through the trial stage, you did that; right?

A That is correct.

Q But you also represented him during direct appeal?

A You mean to the Virginia Supreme Court?

Q That is correct?

A Yes.

Q And the record reflects that the Virginia Supreme Court decision was issued in early September 1987. Does that sound about right?

A Again I don't recall exactly. If that is what is on the Supreme Court order, I assume it is correct.

Q Now Mr. Motley, have you ever – you said that you had some health and professional problems. Were your health problems related to depression?

A Yes, they were.

Q And I would like to ask what your symptoms were while you were depressed.

A Well if you will recall, I outlined [22] those at length at a deposition back in January.

Q Right.

A As best I can recall, back during the late spring, early summer of 187, I was having difficulty sleeping, I was having a lot of difficulty concentrating, handling work, making decisions. I think I got very frustrated with a number of things.

My wife would probably also tell you I got very withdrawn, very aloof at times. And I just . . . I didn't feel particularly good, but I didn't know what was happening or what the cause was.

Q And did those symptoms include difficulty in concentrating?

A Yes.

Q And procrastination?

A Yes.

Q And difficulty in prioritizing matters?

A At times, yes. Some things were easy to prioritize, other things were difficult to. Other things I didn't even want to approach.

Q Would it be fair to say that you had an overwhelming sense of despair during that period?

A I don't know so much as despair but just frustration. Frustration, maybe a feeling of helplessness, that type of thing.

[23] Q Mr. Motley, would you say that this depression occurred all at once, for instance, like a heart attack or was it something that was a gradual process?

A I would say it was probably something gradual. You don't generally with that disease have a date you can pinpoint and say, well, this was the day I had a heart attack or this was the day I fell down and broke my arm or whatever or the day I had a stroke. It just . . . It comes, you can sense something is wrong, but you can't really put your finger on it.

Q And isn't it true that you had, prior to 1987, you had never been treated or diagnosed for this illness?

A That is correct.

Q So that the symptoms that you were experiencing were not something that necessarily brought alarm bells or that you knew what was happening?

A Well I could tell something was wrong, but I didn't know what.

Q And so it would be fair to say that this was an injury of a thousand cuts in the sense that it was cumulative and gradual?

[24] A That might be one way to describe it.

Q Now you first saw an internist in June of 1987, Dr. Gaddy; is that correct?

A I believe that time frame would be right, yes.

Q And you told Dr. Gaddy that you were fatigued and depressed, didn't you?

A I don't think I told him I was depressed. I told him that I wasn't feeling particularly good, that it had been a while since I had had a physical, and that there

were times I felt out of sorts or fatigued. I think I told him I was fatigued. I don't recall telling him I was depressed.

Q Was Dr. Gaddy your regular physician? Had you had a longstanding patient-client relationship with Dr. Gaddy?

A No. My previous physician, family physician, had been Dr. Henry Bourne. Dr. Bourne was an elderly doctor, he had retired sometime about that time or maybe prior to that.

And Dr. Gaddy was a very highly regarded doctor, his partner had treated my mother on occasion, and I went to him because I knew he was a good doctor, and also I wanted a good internal [25] medicine doctor for a physical.

Q So you told him that you had fatigue and lack of energy?

A I believe so, yes.

Q And did you also tell him that that had been occurring for about six months?

A I really can't recall.

Q Did you, seeing that Dr. Gaddy was not your regular doctor, did you fill out a questionnaire that oftentimes is kind of an intake questionnaire for a doctor listing your symptoms and your prior medical history? Do you recall that?

A I really can't recall.

MR. POWERS: Your Honor, may I approach the witness?

THE COURT: Yes.

Q There has been an exhibit that has been previously marked as Exhibit 13, which is records from Dr. Gaddy that we have received through subpoena, Mr. Motley.

A All right.

Q And I am going to hand you what is part of Exhibit 13, which states the complaint. And does that refresh your recollection about the length of period of time that you brought to the attention of [26] that doctor?

A I really don't recall, and this is the first I have seen of it.

Q Now would you have any reason to believe that the doctor's records which state fatigue and lack of energy for about six months would be incorrect?

A No.

Q Mr. Motley, also as part of those records, you did fill out a questionnaire, and I am going to show you that. That is again Exhibit 13, is that your handwriting?

A Yes, that is my handwriting.

Q And I am going to direct your attention to Page 2, which is a series of questions. Did you circle in response to questions regarding your symptoms, were you the person who was circling yes and no?

A Yes.

Q And did you circle the box saying depression?

A Yes, I did.

Q And you also circled extreme tiredness and weakness?

A If that is circled on there, yes.

[27] Q And depression and anxiety?

A You just asked me that.

Q Frequent and severe headaches?

A Yes.

Q Now Dr. Gaddy was not trained in psychiatry, was he?

A I don't think so, no.

Q So he was basically an internist and family doctor?

A Yes, M.D., internal medicine.

Q So he did a physical and tried to ascertain if there were any physical ailments that could account for your symptoms; correct?

A That is right.

Q But you didn't see a psychologist or a psychiatrist who was trained in things like depression until September of 1987; isn't that correct?

A That is correct.

Q And the first doctor that you saw was a psychologist Sam Fletcher?

A That would be right.

Q Now by September of 1987 you were in, is it fair to say that you were in pretty bad shape?

A I would say so, yes, looking back on it, [28] that is probably a good way to put it.

Q And were you urged by your wife and close family friends that you really needed to see a mental health expert for some counseling and for some therapy?

A Yes, and at that point I realized it myself.

Q And that was what precipitated seeing Dr. Fletcher in September of 1987?

A Yes.

Q And when Dr. Fletcher examined you, did Dr. Fletcher tell you that you were suffering from depression?

A As best I can recall, yes.

Q And did he also recommend, was he concerned that there was a possibility of some unfocused suicidal thoughts?

A Really, no. If he had those concerns, he didn't express them to me. As I recall my conversation with him, the main thrust of it was, You are exhausted, you can't stay on top of anything right now, for nothing else, get some rest.

Q And did he recommend that you be hospitalized?

A Yes.

[29] Q Did you act upon his recommendation?

A Yes, I did.

Q And where were you hospitalized?

A He referred me to a hospital in Roanoke, a doctor in Roanoke, Dr. Hartman.

Q And that was a psychiatric center?

A Yes, part of Lewis-Gale hospital.

Q And how long were you in Lewis-Gale?

A Probably several weeks.

Q After you left Lewis-Gale, were you under the continued treatment of psychiatrists and psychologists?

A For a while, yes.

Q And did Dr. Fletcher continue to see you and treat you?

A Yes, he did.

Q He is a psychologist, correct?

A That is right.

Q And did you also have psychiatric care as well?

A As best I can recall, yes.

Q And Dr. Hartman was a psychiatrist, wasn't he?

A Dr. Hartman is a psychiatrist.

Q Did he prescribe medication for you?

[30] A Yes, he prescribed Doxepin for me.

Q What is Doxepin as best you know?

A As best I know it is like a first generation anti-depressant prescription medication.

Q So beginning September 1987 you began taking medication and also you were undergoing therapy?

A That is correct.

Q Seeing a psychologist and a psychiatrist?

A That is correct.

Q Later did you see Dr. Ashby?

A Yes.

Q In Danville?

A Yes.

Q And he is a psychiatrist, too?

A Yes, he is.

Q And when did you move to Richmond?

A October of 1990.

Q And were your problems with depression continuing at that time?

A I was still under treatment.

Q And did you see Dr. Beshara in Richmond?

A Yes, I did.

Q He was a psychiatrist?

[31] A Yes.

Q And then later Dr. Shield?

A Saw Dr. Shield.

Q And did your medication change during this period? Did it remain Doxepin or were there others?

A It changed. They had had to try something else for me besides Doxepin because Doxepin wasn't really helping me. It is a drug that has a tendency to – in some people, some people it is obviously highly effective.

But in my case it was making me lethargic, sometimes even more fatigued. It has a tendency to slow you down, to put weight on you. I was getting a lot of the side effects, adverse side effects that Doxepin can create, but I was not getting a lot of the beneficial aspects that I should have been getting from it. So they tried another medicine, which I do not recall. And then tried Prozac, which was the most successful.

Q For how long a period were you taking Prozac?

A I was on Prozac I guess probably for, probably the better part of two or three years. I can't recall the exact time frames.

[32] Dr. Shield about sixteen months ago felt I had progressed to the point where he wanted to see if he could wean me off medication and let me try getting by without medication.

And that has been I guess maybe about sixteen or so months ago, and so far things have been successful. I haven't had to go back on it.

Q Well that is good. So Mr. Motley, would it be fair to say that from 1987 until early 1994 thereabouts you received the benefit of medication for your depression?

A Yes. Dr. Shield let me get off it sometime during 1994, I can't remember the exact date.

Q Now I would like to go back to, you testified a moment ago that you had no reason to disbelieve Dr. Gaddy's medical records that your complaint in June of 1987 was fatigue and tiredness and depression for about six months.

A (Nods affirmatively.)

Q Would you agree with me that certainly your depression did not begin the day before you stepped into Dr. Gaddy's office?

A I am sorry, could you rephrase the [33] question.

Q Would you agree with me that it is a fair statement that your depression certainly didn't begin in the week before you saw Dr. Gaddy in June of 1987, that there was some period of time before you sought treatment that you were suffering from depression?

A Well, I think I have already testified that it is something you can't put a finite beginning or ending date on.

Q Right.

A I knew something wasn't right, but I am not a doctor, at least not a medical doctor, and I knew I was not, for whatever reason – depression, indigestion, whatever, I wasn't feeling up to snuff. And for those reasons I decided I better get a physical.

Q Right. But let's have no mistake about it, I mean, looking back on it now, you have no reason to believe that your tiredness and fatigue and depression that you list in your symptoms was not depression now that you know what it is?

A In retrospect, yes.

Q And in fact, you saw other doctors. For instance, Sam Fletcher, the first psychologist that [34] you saw in September of 1987 who recommended your hospitalization, isn't it true that you told him that you had been suffering depression off and on for a number of years?

A Well I think I had told him that in retrospect I had some periods in my life that may have been depressive episodes and I didn't realize it.

I had had some times probably all the way back to my senior year in college, maybe even before, I don't know, I don't know.

All I know is, I had gotten from when I was born in November of 1953 up to 1987, and there had been disappointments, there had been the usual travails, there had usually been the little victories and little defeats and sometimes big victories and little defeats – big defeats, rather – that make up life for all of us.

But I had never had anything quite like what was happening to me at that particular time in the late summer, early fall of '87.

Q Isn't it fair to say that at that time things had from a health perspective and from a professional perspective had begun to spin out of [35] control and fall apart?

A Yes.

Q But that before the actual falling apart, you have told a series of doctors that you had been depressed for a number of years; correct?

A I think I told them that looking back I may have had what was depression in retrospect.

Q And in fact you told Dr. Hartman that you had been depressed, again when you saw him at Lewis-Gale psychiatric center, that you had been depressed for a two-year period; isn't that correct?

A It is possible. You are asking me something from a conversation almost nine years ago.

Q Would you have any reason to disbelieve the records from your stay at Lewis-Gale Psychiatric Center?

A No, I wouldn't.

Q And if they reflected that you had told them that you had been depressed for two years, you wouldn't dispute that statement today, would you?

A No, I wouldn't dispute it. I was also a very sick man when I finally did get to Roanoke.

Q I understand that. Now early in your testimony, Mr. Motley, you said that you had stopped practicing law for a variety of reasons, health and [36] professional. This depression did affect your work, didn't it?

A Yes, it did.

Q And ultimately you decided that practicing law with your medical problems and struggles, that it was incompatible with that illness; correct?

A Practicing law is stressful if you are completely one hundred percent healthy. And I think I may have told Dr. Shield when I first saw him that I had just completely

burned myself out in private practice, especially the heavy trial practice that I was doing and had been doing.

So to answer your question, yes, I think everything got to the point where in my position as a solo practitioner in Danville, Virginia, the strain of practicing law, especially a litigation practice, got to be more than my health and wits could carry.

Q And right before you were hospitalized in 1987, you were distressed because you had failed to mail something in or attend to a matter in your law practice which was a costly item and distressed you; is that correct?

A It was a potentially costly item. It [37] was a filing with the State Corporation Commission that I missed that could have cost my client a considerable amount of money. Thankfully it didn't, but I didn't know that at the time, and I was very upset about that, yes.

Q And there is really no question that your depressed state that you testified to this morning was directly linked to you not making that filing in a timely fashion? Would you agree with that statement?

A I would say so, yes.

Q And there were other complaints that were made in the mid-1980's regarding your practice of law, isn't that correct, by clients?

A Yes.

Q I am going to take three matters, one at a time.

A (Nods affirmatively.)

Q And the first one was your private reprimand by the Sixth Committee of the Virginia State Bar involving the Cary Scearce trust account. Do you recall that?

A Yes.

Q And when you received that private reprimand, it was because the Court had concluded [38] that you had failed to handle those trust accounts properly; isn't that correct?

A It was failure to keep proper records.

Q And you had failed to deposit Social Security checks in a timely fashion?

A Yes.

* * *

Q In addition to failing to deposit Social Security checks, you also lost a number of checks, didn't you?

A There were some items lost. There was [39] reimbursement, complete reimbursement made to the estate.

* * *

Q There were also checks that bounced because of insufficient funds in the account; isn't that correct?

A Yes. As I testified at length at the deposition, I didn't manage it as I should have, with the diligence that I should have.

I admittedly procrastinated on a number of things that should have been done with it. And as I told you at the Attorney General's office back in January, I am probably the world's sorriest bookkeeper, still am. And all of that came to play in that and another problem.

Q And you have testified that procrastination was a problem and also ability to pay attention to details; isn't that right?

A That is right. As I told you, I am not an accountant.

Q Or to meet deadlines?

A That was also a problem as well.

[40] Q Now you handled that trust account from 1984 to 1986?

A No, I really handled it I think from 1982 to 1986. The problems blew up around I think '86 –

* * *

Q When the hearing for the Sixth District Committee – this is not in evidence – of the state bar, in other words there was a hearing prior to you receiving the private reprimand; correct?

A As I recall, it was in '86.

Q And would that have been early '86, mid-86, summer of '86, late '86?

A I don't recall the exact date. May have been late '86.

Q Do you recall in point of time how close it was to you receiving the private reprimand?

A I don't recall.

[41] Q Would that have been in a matter of weeks?

A Probably.

Q And would you agree that being brought up on complaint before the bar is a stressful event in and of itself?

A Yes.

Q And you received that private reprimand on the same day that Mr. Williams received his sentence of death, didn't you?

A I really don't recall.

Q But the record would reflect what those dates were?

A You have the records, I don't.

Q There was also a public reprimand regarding a divorce and property matter; correct?

A That was correct, yes.

Q I am going to go quickly on this, that you had a one-year period to prepare a deed as part of a divorce settlement, property and divorce settlement; isn't that correct?

A I don't recall the exact time frame. There was supposed to be a disposition of property pursuant to a divorce.

Q And you failed to attend to that; is [42] that correct?

A That is correct.

Q And again that was procrastination?

A It was. There were also some – there were some problems with the divorce, and there was also a period

where things kind of got put on hold because the parties were trying to get back together. They did not reconcile, but they talked about it for a while, and they wanted kind of for things to . . .

Q But they filed a complaint and were quite upset because deadlines regarding the preparation of that deed pursuant to disposition of the property was not attended to?

A As I recall, yes.

Q And finally your license to practice law was suspended for a hundred and twenty days in May of 1989; correct?

A That would be right.

Q And again that was for failure to handle trust funds properly?

A It was chapter and verse of what I told you about a few minutes ago, and the same thing that I answered your questions at length on back in January.

[43] Q So that you were unable to attend to the details?

A Exactly.

Q To monitor the accounts, to meet deadlines; correct?

A That is correct.

Q And you procrastinated?

A That is correct.

Q And that led to the suspension of your license for a hundred twenty days?

A That is right.

Q And the Virginia State Bar noted that that inattention to that trust account matter encompassed virtually from 1982 up to 1989; didn't it?

A I don't recall that part, no.

Q But whatever it says, it says in the decision?

A Yes.

Q Now Mr. Motley, isn't it true that procrastination, inability to pay attention to details or to meet deadlines were some of the same symptoms that you experienced in your depression?

A Yes, I think that is part and parcel of it.

[44] Q And isn't it also true that when you had therapy with your doctors after you finally sought treatment in 1989 that you told your doctors that the complaints which had led to the discipline at the bar were related to your depression?

A Yes.

Q Because in your depressed state, looking back on it now, you were not able to attend to those matters, details, and keeping account of those records; isn't that correct?

A Well hindsight is always 20/20. In looking back, I can see where it played into it.

Q Now Mr. Motley, we are here today, as you know, because Mr. Williams, your client, is on death row, and this is a habeas proceeding; correct?

A That is correct.

Q And isn't it true that the burdens and responsibilities of handling a capital murder case are much more difficult and immense and time-consuming than it would be for a simple trust account?

A Well I don't know. I don't know that I would go as far as saying that. I don't know beans about accounting, but I think I have a pretty good handle on approaching criminal cases.

[45] Q So but would you agree with me that again looking back on it because you had not sought treatment at that time, that your depression has to be taken into account as explaining some of your actions or inactions during the time that you represented Mr. Williams?

A You mean during the Williams trial?

Q Yes, sir.

A No, because I had given the Williams case priority. Something you haven't asked me, during this time, even when things professionally were going downhill, I was trying to concentrate as much as I could on the criminal part of my practice because, first of all, I felt I had a duty to the Court.

Now that is not to say I didn't have a duty to the Court in anything else, I don't put that spin on it. But I felt like I had to give the criminal cases top priority, because first of all they had priority on this docket here.

And I had someone's freedom or property or in Mr. Williams' case, his very life on the line. And part of the problem I got up a tree on some of my civil files, including the two trusts and the divorce, was because I was having to put extra [46] time and even more with just myself being really the only person in my office, on criminal matters, on defending criminal cases, getting them prepared, getting them tried, and then getting through the sentences, and in many cases the appeals thereafter.

Q Mr. Motley, I can appreciate the difference between criminal and civil, and I also have no doubt that you did the very best you could.

But if depression was affecting your ability to meet deadlines and your attention to things like keeping accounts and depositing checks and having checks bounce, wouldn't you agree with me that looking back at it now that this would also account for some of your actions or failure to take certain actions during your representation of Mr. Williams?

A I really –

MR. CONDON: Judge, that is too general.

THE COURT: I am going to sustain the objection.

Q Well let me just see if I understand this, Mr. Motley. Are you saying that you were depressed and unable to attend to details when it came to civil matters, but you had no problems when [47] it came to criminal matters?

A Generally I was able to handle criminal matters all right.

Q So you were able to compartmentalize your depression in that respect?

A Well let's not say that I felt great and hunky dorey every day I came to court to try a criminal case. But at the same time, there were some cases I could approach, I could sit down, I could do what had to be done, whether it was write a letter, file a motion, prepare bankruptcy schedules, get a will drafted, show up in court. There were other cases I would get nauseated if I got even close to the file.

I am not a doctor, I can't crawl inside my head and say here is what happened on August 6, 1987 at four o'clock and this is why it happened. You know, I don't know, I don't know.

I do know things started spinning out of control personally, health-wise, and professionally in the summer of '87. And that was what I had to get help for.

You know, you can stretch it, pull it, put any kind of spin on it you want to. Some things I could do fine. I was able to get my [48] criminal work done, was able to get my bankruptcy work done, but other things at the office slid, yes, and that is what I had problems with.

Q Well Mr. Motley, maybe at this point we can turn our attention to the trial and maybe that will shed some further light on this.

In preparation for when you were appointed for the Terry Williams capital murder case, you were acting in a sole capacity for a number of months; isn't that correct?

A More years.

Q No, I mean when you first appointed to represent Mr. Williams in July of 1986, you didn't have co-counsel until fairly late in the process?

A It was just me at first. I don't recall how much later on Mr. Smitherman came in the case.

Q Did you read any books or articles or any special preparation for this trial, this capital murder trial?

A Excuse me?

Q Did you read any books or articles or any special preparation for this trial when you were appointed?

A As I recall, I think maybe one thing I did was pull out the Johnny Watkins file. I had [49] worked on that case previously, which was also a capital murder case. In fact it was two capital murder cases, because there were two robberies and two murders in that case.

As I recall, I think I pulled those files out, went over things in that, looked at the pleadings, kinds of motions that would have to be involved. I think as far as special preparation, each case has its own challenges.

Q Right. Did you confer or contact any lawyers prior to the time about the Terry Williams capital murder trial before Mr. Smitherman was appointed as co-counsel?

A I really can't recall.

Q Did you contact any resource groups such as the Virginia Death Penalty Resource Center or any of its predecessors or the NAACP or any resource group for assistance?

A As far as specific advocacy groups or legal defense groups, no, I don't remember anything on that. I think I had some contact with them during appellate proceedings, but not at the initial stages, no.

Q Now you noted that you had done a prior capital murder case?

[50] A Two.

Q And you had also done non-capital murder cases?

A That is correct.

Q And serious felony cases?

A That is correct.

Q What in your view is the difference as far as preparation between a capital murder case and a non capital murder case, if any difference?

A Well really in many respects I don't know that there is all that much difference. Criminal cases pretty much boil down to one issue, did you do it or not. And if you did do it, did you do it to the extent that the state claims he did?

In other words, is there a lesser offense involved or are there any mitigating or aggravating circumstances. You have that in any criminal case, whether it is an assault case or a robbery case or a homicide case.

It is not like a civil case. Civil case is like an algebra problem, there are a lot of places an algebra problem can be missed or go wrong.

A civil trial can go wrong, you can lose it in the discovery part, you can lose it in [51] pretrial, you can lose it on liability, on damages.

Most criminal cases aren't – they are multi-faceted, but in a different way. It is kind of like lacrosse and field hockey. They are the same game with the same goals, but they are obviously two different sports. And I think that kind of is the same situation here.

I don't know that there is any – a capital case, yes, it has its own challenges, it has things that have to be looked at, research done. But I don't know in its own way just academically speaking you approach it all that completely differently from the way you do any other serious felony case.

Q Did this particular case with Terry Williams pose unusual difficulties or problems?

A The biggest and most difficult problem was Terry was complaining of mental infirmities, things that would suggest emotional or mental problems or instability that just was not borne out by the doctors who examined him.

The biggest problem was that Terry was claiming that he was having dreams of visions of voices or whatever, apparitions, that would lead him to believe he had been implicated in [52] these crimes.

None of the mental health professionals, Dr. Ryans, Dr. Centor, Dr. Mansheim, I don't think anybody that examined him came up with anything to verify that or even to give us anything much to hang our hat on as far as either an insanity defense or anything like that or really even mitigating circumstances.

That was the big challenge, the big difficulty, the big frustration, for lack of another way to put it, with Mr. Williams' case.

Q I am going to get to that, your work with those experts, in a moment. But how much work did you put into this case prior to the appointment of Mr. Smitherman as co-counsel? How far along were you?

A Things had gotten pretty far along. I had already I think talked with the police and talked with Mr. Fuller and a couple of his assistants at length, and also of course talked with Terry.

And I had reviewed I think some of the scientific reports that were back. I was already well underway on it. I can't tell you to what degree or what.

Q Would you agree that you acted as lead [53] counsel in this case?

A Yes. I had had experience with two other capital murders. And one, the Price case that – it was not a capital case in Virginia, but it was very difficult murder case.

And Mr. Price was charged with another murder in North Carolina for which he was subsequently convicted and is now on death row in Raleigh.

Q So by virtue of your earlier appointment in the case and greater experience, that would explain your lead counsel role?

A Well, yes.

Q Was there an agreement to split the work up in any agreed-upon fashion between you and your co-counsel Mr. Smitherman?

A Yes.

Q And tell me how that was done.

A Well, I can't recall exactly how we split it or who did what, it has been just too long a passage of time.

But I think each of us undertook certain areas of preparation for the trial. I think we each researched particular points of law in the case.

[54] I remember meeting with him at times when we would say well you do this, I will do this, you work on this, I will look at that. I can't recall for you exactly how we split it, but we did divide up the work.

Q And in dividing up the work, was one of the goals there efficiency in the sense that you both wouldn't cover the same ground?

A We wanted to avoid I think following each others footsteps. And also we just wanted to – we wanted to try to cover as much ground as we could.

And Mr. Smitherman – Mr. Smitherman also had obviously support staff at his office that I didn't have at mine. So if we had anything that had to be typed or anything of that sort, we drafted, and then it would go to his secretary.

Q You each handled separate witnesses in either direct or cross during the trial?

A As I recall, yes.

Q In other words, you didn't double team a particular witness?

A Well under Virginia criminal procedure and just under the rules of court, there is no tag teaming of witnesses.

[55] Q Right.

A Normally one lawyer questions one witness.

Q And would it be a reasonable conclusion that if you handled the particular witness at trial that you also handled the preparation and investigation regarding that witness, as well, primarily?

A Primarily, but I wouldn't etch it in stone. Sometimes just for a break one of us would maybe take the other's witness. I mean, we knew what we wanted to ask them, we knew what we were trying to get out of them.

Most of the time, though, as I recall, it followed that whoever had worked up things on that point, that person would handle the examination.

Q How many times did you speak to Mr. Williams?

A I can't recall. I talked to him at times, Mr. Smitherman talked to him at times, and we talked with him together.

Q And when you talked to him, would it be your practice to – or when you talked to him for an extended period of time, would you make notations in [56] your file?

A Sometimes I would, depending on what I was talking with him about. It has been a long period of time, and I really don't recall.

Sometimes it was just to talk to him to try to tell him, Hey, here is what is going to happen next. And we have been over to the police department, we have talked to detectives, and here is what they told us.

Q Did the police report, the initial police report regarding the death of Mr. Stone, the decedent in the case, were you privy to the police report that was prepared by Officer Poteat?

A No, I don't think so.

Q Let me just, because I –

A Normally police reports aren't discoverable.

Q Right.

MR. POWERS: Your Honor, with your permission we have stipulated to an Exhibit 1, which is a police report from Officer Poteat dated 11/3/85.

Q And I am just wondering if that refreshes your recollection, if that is a document that came to your attention?

[57] A No.

Q And when you say no, since those normally don't come to your attention, in looking at that, you can say no I didn't see it?

A As best I can recall, no, I did not see that at the time of the case.

Q Mr. Motley, did you go to, I believe that both the defendant and the decedent both lived on Henry Street in Danville?

A That is correct.

Q And did you go to Henry Street and systematically interview the residents of that street and that neighborhood?

A No, I didn't.

Q Did you ever go to the home of – Terry lived with his mother and an extended family on Henry Street. Did you go to that home and interview in the home setting the members of the Williams family?

A As I can recall, any interviews I had with his family were either in my office or over here at the courthouse.

Q So you never went to Henry Street?

A No. They probably would have thought I was an ABC agent or a process server.

Do you recall the witnesses or potential [58] witnesses that you interviewed in preparation for the trial?

A I can't recall.

Q Would that be reflected in your file?

A I don't know. On the file, the file has gone out to a lawyer in Mecklenburg, lawyer in New York, Mr. Smitherman at the time of the case, a good bit to your office, and a good bit of it my wife sent out I think to a lawyer while I was in the hospital or thereafter. So I can't really recall.

Q How did you, the witnesses that you did interview in preparation for trial, can you recall how you selected the individuals who you would speak to?

A No, I can't recall.

Q There were experts that were appointed by the Court in this case. There were several psychiatric experts; right?

A That is correct.

Q And psychologists and psychiatrists. Dr. Centor is a doctor at Central State, and he was an expert appointed by the Court; correct?

A That is correct.

Q Was he appointed to assist the defense?

A He was appointed to evaluate Mr. [59] Williams. I think one of the first things that was filed as far as a pleading or a motion, especially after Mr. Williams had spoken at length about having dreams or visions or whatever, the first thing was to have psychological examination of Mr. Williams.

In not just capital cases, but in almost any criminal case at that time, the accused would be examined at Central State by one of the doctors in what was called the forensic unit down there.

It was a part of Central State Hospital that was geared specifically to work in forensic psychiatry. And part of its task was to evaluate persons charged with crimes or evaluate persons for court cases in Virginia.

Q I realize that any expert is going to give their professional and neutral opinion in the sense of when they do their evaluation and diagnosis, but what I want to center on is, did you view Dr. Centor as somebody who was appointed to assist you in preparation for trial and to assist you in the preparation for the defense of Mr. Williams at trial?

A Well, not really. I had had cases where Dr. Centor had saved my case. For instance, I think [60] I had a fellow one time that was charged with threatening to blow up the governor.

And Dr. Centor I believe had examined him, and based on Dr. Centor's findings, the man was incompetent to stand trial or was found not guilty by reason of insanity, I have forgotten which.

I had had cases where he helped me, say in terms of defense or mitigation. I had had other cases where he landed pretty much in the Commonwealth's lap and was of no help. My main concern was to get Mr. Williams evaluated.

Q Now Mr. Williams was – part of the evaluation was Mr. Williams' IQ?

A (Nods affirmatively.)

Q And that rated, as Dr. Centor I believe said, on the borderline between mental retardation, right on that border there; right?

A As I recall, yes.

Q And you realized from that diagnosis and from your interactions with Mr. Williams that he was not going

to be the source, given his limited capacity, of a great deal of information that was necessarily reliable; is that correct?

A I am not sure I understand your question.

[61] Q Let me rephrase it because I want to be clear. You were aware that Mr. Williams had limited intellectual capacities?

A Yes, I knew he had a limited education.

Q And he didn't, you know, perhaps went to 7th grade?

A Uh-huh.

Q And was of limited intelligence?

A Right.

Q And that was evident to you before you even got the IQ report?

A That was evident, yes.

Q And you realized that dealing with Mr. Williams and his limited intelligence and capacities that it would be necessary to do some digging to find additional information because your client would not necessarily be the most helpful client in the world?

A Well it wasn't just Mr. Williams' case. I mean, I have had some clients with the same background or mental disability or disadvantage as Mr. Williams who are extremely helpful on their cases and who actually even made unbelievably somewhat articulate witnesses.

I never had any problem communicating with Mr. Williams. That is not to say [62] he could tell me everything that I needed or give me an explanation for everything or pull everything together.

But at the same time, Mr. Smitherman and I could carry on a conversation with him, we could get information from him.

Q What information when Dr. Centor evaluated Mr. Williams at Central State or wherever he evaluated him, what type of interaction and communication did you have with Dr. Centor?

A As best I can recall, I think I may have talked with him on the phone possibly before the examination. I know that I sent him copies of practically everything I have – the indictments, autopsy reports, what background information I could gather.

I tried to send that to Dr. Centor, one, because I wanted him to see the situation that we were facing in having to develop a defense for Mr. Williams.

And secondly, I knew the Commonwealth was going to send him everything but the kitchen sink. And I wanted to be able to rebut that and not have everything that came into his hands coming just from the Commonwealth's Attorney's [63] office.

Prior to trial did you meet with Dr. Centor?

A Yes.

Q How many times?

A At least once, probably more. But I had corresponded with him and talked with him before the trial. I

can't remember the exact number of times, I know it was at least once, probably more.

Q The one that you can remember when you met with him, for how long a period of time did you meet with him?

A I can't recall. Probably at least fifteen, twenty minutes or more.

Q Now you said that you sent him everything you have regarding Terry's background; is that right?

A That is right.

Q In advance, in your preparation and investigation prior to trial, did you locate Mr. Williams' school records?

A No.

Q Did you make any attempt to locate them?

A No. Wouldn't have done much good.

Q But you never saw them to be able to [64] make that analysis one way or the other?

A No.

Q Right?

A That is right.

Q And you never looked at – did you take any steps to get Terry Williams' doctors' records?

A No.

Q Did you make any attempt to get the records of Terry Williams from the Department of Youth and Family Services?

A Those were off limits to me. Those are normally not discoverable.

Q Did you make any attempts to get those records?

A No, because state law didn't permit it.

Q So you concluded that you were barred from getting – let me just give you an exhibit which has been marked as Exhibit 8, which is the records –

THE COURT: 8?

MR. POWERS: 8, Your Honor.

Q The Department of Youth and Family Services, which we got by just writing a letter. It is – without subpoena. I am going to direct your attention to this document dated September 11, 1955.

A All right.

[65] Q Now you have never seen that document before I take it?

A No, sir.

Q That document reflects that at the tender age of one year, Terry Williams was placed in a foster home because his parents were drunk and they had given the three or four children were also drunk, they weren't clothed, there were feces on the floor, there were pools of urination on the floor, the house was a shambles, Social Services concluded that the parents were neglectful.

Now that report, if it had come to your attention, would you have thought that that report would have been a significant piece of evidence to give to the doctors in this case?

A Possibly. If I had had it, I would have sent it, yes.

Q Would it have been a report that you would have introduced into evidence at the trial to bring to the attention to the judge and to the jury regarding mitigating circumstances?

A Well the report itself probably would have been hearsay. But if there was anyone around from the Danville Juvenile Court, say the social worker or someone who could vouch for the truth [66] therein, chances are we would have had them.

Q So apart from any evidentiary or procedural problems with admitting it into evidence, if there were any, you would have put that into the record?

A Yes.

Q If you had known about it?

A Yes, if I had known about it.

Q But you didn't know about it?

A I didn't know about it, and back in 1985 that kind of thing was normally not discoverable without a subpoena and good cause shown.

Q Did you seek the issuance of a subpoena?

A No. As I said, I didn't know about it.

Q Did you seek to locate records showing that Terry Williams' mother while he was in his infancy was arrested several times for bootlegging?

A No.

Q Did you interview Terry Williams' mother and ask her about her alcoholism or her drinking at the time that she carried Terry Williams in utero?

A No.

Q So you made no attempt to locate those records either?

A No. As I said, we didn't know they were [67] out there.

Q Did you make any attempt to secure records regarding the decedent, Mr. Stone, any doctors' records?

A There were none really to gather.

Q But did you attempt to gather them?

A No.

Q Now the cause of death of Mr. Stone, the decedent, was an issue during that trial?

A Very much so.

Q But you didn't try to locate any records showing any prior injuries, did you?

A (Shakes head in the negative.) Did not know where to look.

Q Did you make any attempt to secure correctional records regarding Terry Williams?

A No.

Q How about employment records?

A We tried to pin down his employment history, and there was very little that we could hang our hat on

there. Normally employers are persons that I try to get help from where I have got a criminal case.

Now normally granted it is usually one where it is trying to get somebody's [68] driver's license back or something of that sort. But it was a resource we just really didn't have as far as Mr. Williams' case.

Q Were you aware either through interviews or records that Terry Williams had spent four years after the report that I showed you a moment ago in a foster care? Were you aware of that?

A No.

Q Going to the cause of death, did you interview neighbors or people in the neighborhood on the question of Mr. Stones', the possibility of Mr. Stone the decedent, having prior injuries?

A We talked to some people; I don't know if they were from the neighborhood. We talked to some people, but nobody could tell us anything definite.

Nobody could – nobody could come up with anything we could use in court, is what I guess I am trying to say.

Q The record reflects that you had several witnesses subpoenaed.

A Yes.

Q Do you recall who you subpoenaed? And was that on the cause of death issue?

A I don't think so.

[69] Q Do you know what those witnesses who were subpoenaed the purpose, what was your intent in putting them on?

A I am thinking – and again I am having to stretch to remember – I am thinking they were more on the mitigation issue for sentencing.

Q So that there were – any witnesses that you subpoenaed, did you put on?

A Yes.

Q Now did you ever consider hiring a private investigator?

A We made, as I recall we made a motion for the appointment of one. First of all, if we got one, it was with the Court's discretion. We made the motion, as I recall, and the motion was overruled.

Q Right.

A Neither Mr. Smitherman nor I had the resources to hire a private investigator.

Q And of course Mr. Williams was indigent; correct?

A That is correct.

And had no resources to kick in for that purpose?

A That is correct, nor did his family.

Q And you considered the hiring of a [70] private investigator important to this case in order to do more in-depth research into the cause of death and the robbery; correct?

A It is something I would have liked to have had; correct.

Q And a skilled private investigator might have been able to negotiate his or her way around the neighborhood of Henry Street, for instance, more effectively than you thought you could?

A Probably.

Q And whatever motion that you made for a private investigator would be in the record, wouldn't it?

A It should be. If we made it, it is in there.

Q But you certainly felt that that was something that you needed?

A It is something I wanted. It is something that would have been nice to have, but again I had gone down the same road in the Watkins case.

And I think Mr. Conway and I may have gone down the same road in the Ricky Price case. There are a lot of things that you can ask for, obviously, like private detective or an independent [71] psychiatric examination.

Now we weren't even entitled to the independent psychiatric evaluation until the Ake case came down out of the U. S. Supreme Court just before Ricky Price's case.

Ricky Price's case was the first one we were able to get another, as I recall, another doctor. And Ake had come out, as I recall, by the time Mr. Williams' case rolled around.

But asking for it is one thing, getting it is another. Generally the Courts at least in this part of Virginia don't grant it, even in capital cases.

Q Okay.

A Or at least they didn't in the mid-80's.

Q Now Mr. Motley, getting to the cause of death, this was an unusual case, would you agree, because it entailed the exhuming of a body and an autopsy performed many months after the fact?

A That is right.

Q And is it fair to say that is the only case that you have ever been involved in that that has occurred?

A That is true.

Q And the state actually used their own [72] pathologist to perform an autopsy because no autopsy had been prepared when the decedent died?

A Yes, the state had their own medical examiner, and it is not something that the Commonwealth's Attorney cooks up. It is what the state, it is what the Virginia Code, you know, prescribes for instances where there is an exhumation based on possible foul play or criminal activity. I mean, it is not a scheme or something the prosecutor cooks up.

Q Sure. And in order to put yourself on the same footing that the state was, in the sense that they had a medical examiner, did you request the Court for the appointment of your own pathologist to assist in the defense and your preparation in a trial regarding the cause of death?

A No.

Q But you will agree that the cause of death was one of the central issues in the case?

A It was an issue in the case, yes.

Q And in fact you had argued that the cause of death could have been alcohol poisoning, for instance?

A That is what the initial finding was. There was already medical evidence in there that I [73] think Mr. Stone had like a .41 blood alcohol content, which is as I understand it practically a lethal concentration in itself.

And Mr. Stone also lived in a very high crime area. And as best we would gather, Mr. Stone also had a proclivity to drink himself into oblivion. So, yes, the cause of his death was very much an issue in the case.

Q When you ascertained that he drank himself regularly into oblivion – Mr. Stone – did you consider putting on witnesses to that effect to show that to the jury?

A Well we considered it, but again we looked, we looked for people who could come up to the courthouse and say, look, this guy fell down, this guy cut himself, this guy did this, that, whatever.

We tried to go down that road, and what we found as far as good hard reliable evidence that would, one, be admissible, and two, have even an inkling of credibility in front of a jury just wasn't out there.

Q You just couldn't find it?

A Several people that we found, all we had was just hearsay – I heard he was a loser, I heard he fell down at

work. We didn't have anything. If we [74] had had it, you can bet your bottom dollar we would have had it on the witness stand.

* * *

[75] Q Mr. Motley, did there come a time that you made a motion to the Court for the appointment of an independent psychiatrist to help the defense?

A As best I can recall, yes.

Q And was Dr. Mansheim appointed pursuant to your motion?

A Yes, sir.

Q And in your mind was Dr. Mansheim different than Dr. Centor?

A Yes.

Q So that Dr. Mansheim was there to specifically assist you during the course of the trial in preparation for trial?

A Well not so much that. It was also to give us a second, an independent opinion. At that stage, as much as assistance was involved, I had already come up empty handed on one examination of Mr. Williams.

And for another reason, I wanted to get a second opinion. And Dr. Mansheim represented that opportunity.

[76] Q But you didn't avail yourself of that opportunity for a second opinion regarding a pathologist or you didn't attempt to?

A No. There was already case law with Ake that opened the door to get a second doctor, second psychiatrist. Frankly, if it had not been for the Ake case, Dr. Mansheim would never have entered the Williams case at all.

Q So is it fair to say that it wasn't that you didn't think you needed a pathologist, it was that you didn't think you could get one?

A That is right.

Q So you didn't ask?

A That is right.

Q. Was future dangerousness anticipated to be an important part of this case, the issue of future dangerousness?

A Both future dangerousness and also possibly vileness, not so much in killing, but just the circumstances of a robbery, an old man who was defenseless.

Q Did you say vileness?

A I anticipated that that could possibly have also factored in, because you did have a defenseless, elderly victim.

[77] Q Okay. And as this case proceeded to trial, was vileness still in the case, was that part of the case?

A Indirectly, indirectly. It was still something that we wanted to be ready for and have something in the back of our minds what to do on if the prosecution trotted it out.

But it didn't, it didn't look like it was going to pan out to be a vileness case as much as it would future dangerousness.

Q At one point Dr. Centor wrote you a letter stating that he believed that Mr. Williams had a low probability of future dangerousness; isn't that correct?

A I really cannot recall. There were several things from Dr. Centor.

Q Let me just show you Exhibit Number 2, which is a letter to you from Dr. Centor dated August 11 that a psychological makeup is such that there is a low probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society.

A That is right.

Q Do you recall that?

A I believe I do.

[78] Q Now did Dr. Centor ever tell you at any point prior to trial that his opinion had changed?

A He may have; I really can't recall.

Q So you can't recall one way or the other?

A I can't recall one way or the other.

Q But that would have been significant if he had changed that view?

A Anything at that stage could have been significant.

Q Well in fact he did change his view at trial, didn't he?

A As I recall, he did, yes.

Q Now Dr. Mansheim, did you ask Dr. Mansheim to examine Terry regarding the future dangerousness question?

A I sent – I don't know that it was so much on future dangerousness. I did the same thing that I had with Dr. Centor, I sent him what I had as far as pleadings, reports from my file, I sent him correspondence at length.

Q But my question is, you have already answered that future dangerousness you anticipated to be an issue in the case. Did you ask any of the doctors to report to you about their professional [79] opinion regarding the issue of future dangerousness prior to trial?

A I can't recall that I specifically limited it to future dangerousness. I think what I wanted and what I probably may have asked was for anything that might help him on any issue, anything.

Q Dr. Mansheim did testify regarding mitigation, didn't he?

A Yes, sir.

Q And he testified regarding the bullets in the gun, for instance? Do you recall that, that Terry told him that he had taken some bullets out of a gun in an earlier commission of a crime?

A That I don't recall.

Q Do you recall that Dr. Mansheim at that point was released and he went home to Norfolk?

A I can't really remember.

Q But in any event, Dr. Mansheim was not present when Dr. Centor and Dr. Ryans testified on future dangerousness, was he?

A I really can't recall.

Q When did you start preparing for the penalty phase of the trial?

A We had anticipated that we would probably have to go into a penalty phase, and I think [80] I started making some preparations probably as much as a week or two before the trial, just thinking in general terms about what can we get, what can we put on.

Q But you didn't interview any witnesses or try to gather any documents until a week or so before the trial regarding penalty?

A That is right. We were trying to keep it from getting to that first and foremost.

Q I understand. And so that your primary effort was on the guilt phase?

A That is right. We figured that would be where we had to make the initial stand and try to defend right away.

Q Did you speak to Bruce Elliott? Do you know who Bruce Elliott is?

A I can't recall whether I spoke to him or not.

Q A CPA in Harrisonburg, Virginia?

A It doesn't ring a bell.

Q Did you speak to, make any attempt to speak to Terry's wife or to his daughter?

A No, we didn't.

Q Were you aware that his wife and daughter were present at the trial, came to the [81] trial?

A I really can't recall. I think . . . really don't remember.

Q So I take it that there were no records that you sought to locate regarding mitigation?

A No. We had asked Terry and I think some people in Terry's family to tell us anything or anyone who could possibly help Terry or provide us with any information. And as I recall, we used what we got and what we had.

Q Did it come to your attention that Terry had suffered head injuries in the past?

A No. I think that was one of the things that we had asked for as part of his work-up with the psychiatrist was anything from him that might have contribution to his mental state or any particular conditions. Anything that we got on that I think would have come from that.

Q But you didn't do any independent investigation to ascertain one way or the other whether there were head injuries?

A No. Other than I believe, I think that we asked him did you have any kind of disabling injury or substance abuse problem or significant trauma or anything. I think it is probably just the [82] stock question that one would normally ask anybody charged with violent crime.

Q And head injury didn't come to your attention from Terry?

A I don't recall that it did, no.

Q You tried to suppress the confession; correct?

A That is right.

Q And you lost that?

A That is correct.

Q Did you take any steps to challenge the confession before the jury once it was introduced?

A No. It had already been ruled admissible by the judge.

Q Well challenge in the sense that not its admissibility but to present to the jury that the defendant claimed that the confession was a product of dreams and hallucinations?

A I can't really recall offhand. I know that we tried at length to get the confession suppressed, and we were unsuccessful. We did of course make a note of it so that we could preserve it for appeal.

Once the judge had ruled on it, though, as I recall I think we just figured it would [83] be counter-productive to try to keep going back over the confession.

And the more we would go over it, of course the more the jury would be looking at it anyway, so we wanted to just pretty much move on from that point.

Q Mr. Motley, I would like to just touch on a couple of things that I missed and hopefully wrap it up. Is there any family history of depression? Your mother, for instance, has she been treated for depression?

A Not for depression, per se. My mother has had a thyroid condition that has existed since before I was born. She had to have treatment at the University of Virginia Hospital when I was a small child for it.

It can, as I understand, as I understand it, thyroid can cause some symptoms that would appear to be depressive.

Q And was that in fact the case?

A As I understand it, yes, sir, just relating from what my father and others and some of her doctors have told me over the years. She has never been diagnosed with clinical depression per se.

Q Are you under continuing care of a [84] doctor today?

A The arrangement I have with Dr. Shield is that if I feel like a depressive episode is coming on or if my wife notices anything or I start feeling out of the ordinary, I let him know and see him as soon as possible. It is an agreement I have had with him since he got me off Prozac about sixteen months ago.

Q So he is basically on call and monitoring your condition?

A He is on call if I need him, and thankfully I haven't needed him. And right now I feel about the best I have felt in a number of years.

Q That is good. Is there any family history of alcoholism?

A No.

* * *

[84] Q Mr. Motley, the medical examiner for the western district of Virginia is Mr. Oxley?

A Dr. Oxley, yes.

Q Dr. Oxley, I am sorry. Did you meet with Dr. Oxley prior to the trial?

[85] A I can't recall whether I met with him or Mr. Smitherman met with him or both. As best I can remember, we either met with him or talked with him by phone. I am thinking we met with him. I had already had all his reports and everything.

Q Would you agree that, going back to the Terry Williams trial, that that was a stressful, high pressure event?

A I would say so.

MR. POWERS: Your Honor, I have no further questions.

THE COURT: All right, Mr. Condon.

CROSS EXAMINATION

BY MR. CONDON:

Q Mr. Motley, trying to follow in some sequence here, the symptoms that you told Dr. Gaddy I believe in June of '87 that you said you had about six months which would place it December of '86, do you recall having those symptoms during the trial of this case?

A No, I don't.

Q When you use the term depressed, are you using that generically or do you agree that there gradations or degrees? I mean, when you say feeling [86] depressed, you mean I was blue or sad or do you mean I was dysfunctional or somewhere in between all those times you said you had been feeling depressed for the last couple of years?

A I think probably fatigued would be the way to describe it. Fatigue, some days down in the dumps, kind of a why bother attitude.

Again, it is one of those things you know you can't really fine tune it. Some of those times I think may have been generically speaking or generally speaking.

Q Did I understand that you prioritized your work, you prioritized criminal as more important than civil?

A Yes, I did.

Q And how about, would a capital murder case, would that get the highest priority in your criminal practice?

A Yes, it would.

Q And the brief which the record shows was filed sometime in the spring of '87, it was argued in June of '87, did you prepare that or did Mr. Smitherman prepare that?

A We both prepared it.

Q But you did have Mr. Smitherman's [87] assistance on the brief?

A We worked together on it.

Q And that would have been during that six-month period when you said you had been feeling fatigued?

A That is right.

Q Do you know whether Mr. Smitherman did more of the work on the brief or you did more work on the brief?

A I think we split it fairly evenly.

Q Now let me ask you two general questions. What was you and Mr. Smitherman's basic trial strategy at the guilt phase?

A At the guilt phase?

Q Yes?

A We wanted to create as much reasonable doubt as possible.

Q Regarding what?

A Regarding Terry's culpability. We wanted to have the jury have a real question as to what actually caused Mr. Stone to die, whether it was alcohol poisoning or an old injury that he previously sustained or whether it was by foul play.

We wanted to try to show that there were other things besides a mattock blow that [88] he could have died from. We wanted the jury to get the impression that it was the stretch that this man was killed. That was one thing we wanted to do.

We also wanted to try to cast as much reasonable doubt as we could on the robbery. We wanted to emphasize the point that there were people coming in and going out of Mr. Stone's house that could have lifted his wallet or taken things that belonged to him. Those were two of the main things we wanted to emphasize.

Q So you did challenge the corpus delicti of the robbery and of the murder, and you raised those issues on appeal?

A That is correct, all of those were raised again in the state supreme court.

Q Let me ask you this, you did have Mr. Williams' confession?

A Yes.

Q His statement written and taped?

A Yes.

Q And in those he says, I hit the man with a mattock and he started gasping for breath. And he also says that after he put the mattock away, he took the wallet. In light of those confessions, why were you pursuing the challenge of the corpus delicti? [89] What more were you hoping to gain?

A Well we didn't have a lot of ammunition to shoot. We were, as the old saying goes, you dance with the one that brought you. And the only thing that we had was to try to create reasonable doubt and try to get the jury to realize or to think that even if something had happened to Mr. Stone, it was somebody else besides Terry that had

an opportunity to do it. I don't know if that answers your question or not.

Q Did you hope to take advantage of the confusion between the medical examiner and Dr. Hardy?

A Yes.

Q And you did try and bring that out?

A Yes we tried to bring that out. And we raised sand when Mr. Fuller started trying to press Dr. Hardy and Dr. Oxley.

In the brief we argued at length that the Commonwealth was impermissibly impeaching his own witness. And a lot of the appeal swung on that particular assignment of error.

Q So if you can recall, what you were faced with assessing, you had a confession, you had Dr. Oxley's medical report, which while it may not be a mirror image, did match up with the blow and [90] describe the injuries, and your client was telling you what?

A Client was telling us that he was having dreams, he was having visions that he had done these things, but that they were trying to entrap him into claiming that he had actually done it, when he had just dreamed it or envisioned it.

And he was actually pleading for help and was instead being prosecuted for the murder and aggravated malicious wounding.

Q I believe you said either you or Rob Smitherman or both talked to Fuller, prosecutor and the police and the medical experts, including the psychiatrist and Dr. Oxley.

Did you feel that you had a good idea what the Commonwealth's case was going to be at the guilt phase?

A Yes, we did. I had been trying cases against Mr. Fuller's office for six years. And we had been granted full discovery or at least discovery to the extent permitted by the rules of court.

And I had had some lengthy discussions with Mr. Fuller about scientific evidence in the case as far as the autopsy reports. I had already gone over the exhumation, what that revealed [91] as far as that autopsy and proceedings on that.

And I knew from experience in the Watkins case that other offenses in other criminal matters were going to be coming in. And it pretty much has evolved over the years at capital sentencing hearings that the Commonwealth can pretty much pitch in any number of things on the issue of aggravation or futures dangerousness at sentencing.

Q Were there any surprises at the guilt phase?

A No.

Q Based on prior to this trial, had you had experience with Dr. Oxley and Dr. Centor and Central State physicians?

A Yes.

Q Had you ever challenged them before or ever had any call to challenge them before, their opinions?

A You mean as far as their competency?

Q Yes.

A No cause.

Q Do you have any idea how many cases you had had previously where you had relied on opinions of Central State in criminal cases?

A Probably about a dozen.

[92] Q How about, can you recall if you had any cases where you had relied on the medical examiner's office for their opinion as to the cause of death?

A Probably about a half a dozen.

Q Was part of the reason that you didn't seek a pathologist is that you didn't see any reason to?

A I didn't think we would get one even if we asked for one.

Q But how about the fact that Terry's confession says he struck Mr. Stone and he started gasping for breath, didn't that sort of match up with the autopsy?

A Yes.

Q Did you all even discuss, do you recall discussing whether or not to get a pathologist?

A I don't think we did. I don't really recall.

Q You said you didn't think you would get one. Do you think, not in retrospect, but at the time, if you can recollect, do you think you needed one in light of his confession?

A You had the confession, and you had conflicting – you had some conflicting medical reports. The confession was obviously a big [93] stumbling block, and as I testified earlier, the big handicap, the big pitfall, and by

pitfall I mean something about the size of the Grand Canyon, the big pitfall was that Terry's dreams, visions, whatever, none of them were corroborated by the medical people who examined him.

Q And you had no reason based on your experience to doubt the opinions of these experts?

A No reason.

Q And you are not either a psychologist or a psychiatrist?

A No, sir.

Q And it is your practice to rely on experts in their fields?

A That is right.

Q How about your personal observations, did you see anything in your personal observations that alerted you or triggered you to say these doctors must be wrong?

A No. I had dealt with all of them I think except Dr. Mansheim before. I knew Dr. Centor personally and knew Dr. Ryans personally. I had a very high regard for both and still do.

Q Before today have you ever heard of fetal alcohol syndrome?

[94] A Only I think maybe about a year or so ago maybe something on CNN or one of the news shows on TV.

Q Do you know anything about it?

A No.

Q I assume you knew nothing about it back at the time of this trial?

A No.

Q Do you have any idea when it was a matter of common knowledge in the medical profession, if it is?

A I don't recall – as I said, the first I think I ever heard about it was either on CNN one night or one of these news programs like Day One or Dateline or something like that. I think most people know it is not a good idea to drink while you are pregnant.

Q What was your strategy at the penalty phase, if you know?

A Anything that we could do to try to convince the jury that bad as this situation was, it didn't warrant taking yet another human life. That was our main effort was just try to find some way to convince the jury to spare Terry's life.

Q What did you consider your biggest [95] pitfall or stumbling block when facing the penalty phase?

A Again, the confession. The confession and the psychiatric reports on Mr. Williams and also of course the Stroud case.

Q How about the theory that you should put on family members and ministers and friends to say he is a nice guy and nonviolent? Did you consider that strategy? You did put on a couple of witnesses.

A Yes, it was about all we had. It was one of those things where we had a very difficult, I won't say hopeless situation, but a very difficult situation.

And we put on what we had, and we used – a lot of times that is all you have got, and it is something that I had used with the Watkins case, I think it is something that we had also tried as I recall somewhere in the Price case, and in any number of times in other cases or even in Juvenile Court, try to find anybody who can say well this fellow has made some mistakes, but he is not as bad as he is made out to be.

Q Having used it before, had you drawn any conclusions or formed any opinions about the value of this kind of defense?

[96] A Generally of negligible value.

Q Did it work in the Watkins case?

A No.

Q Did it work in the Price case?

A No.

Q So what did you want to get across to the jury, what was your theory about Terry, since you had the Stroud case facing you and all the implications of that, you had his criminal record, you had the fact that he had struck this man down who was almost helpless inebriated and a friend of his to take three dollars. I mean, what did you hope to accomplish?

A I wanted to try to find some way, any way to save his life. And the problem on top of everything else was there was very little Terry had as far as a background or prior accomplishments in life that you could pitch out to a jury.

He hadn't been a star football player in high school who had shown self-discipline and ability to compete and obey rules on the playing field, that was out.

He didn't have a military record, I couldn't argue that this man had served his country well in the Army or had survived all kinds of ordeals [97] in Vietnam, I didn't have any of that to argue.

I didn't have a steady job history where I could argue that this man had gone to work, tried to make a living, done the things that I guess good citizens are expected to do.

I didn't have any of that really to hang a hat on or even pitch out to the jury. The main thing that I had was a bunch of heinous criminal offenses that could not be swept under the rug, could not be overlooked, could not be trivialized.

I didn't want to insult the jury's intelligence. I didn't want to say ignore what all you have seen in court the last couple of days.

I wanted to try to appeal just to their sense of humanity, their sense of mercy and essentially make an argument, hey, the body count with Terry Williams is now two people.

Although Mrs. Stroud was still alive at that time, she was a vegetable. I wanted the jury to see that they could punish him, that they could remove him as a threat, an arguable future danger to society, without taking his life and adding yet another third person, having a third person forfeit their life in the whole history of things.

[98] Q Didn't you make some kind of argument to the jury about trying to emphasize the fact that he had confessed and there wouldn't even be a case if he hadn't confessed? Was that part of your strategy?

A Yes. At the time Mr. Williams wrote the police chief, as best I can recall the Stroud case remained unsolved and Mr. Stone's death was still considered an instance of an elderly alcoholic who imbibed one time too many.

I don't think there was any suspicion of foul play in Mr. Stone's death. Mr. Williams really brought the house down on himself.

Q They showed you Exhibit 2, the August 11, '86 letter from Dr. Centor about no future dangerousness. Do you know whether or not at that time Dr. Centor was familiar with his criminal record and the facts of the Stroud case and the other charges?

A I don't recall about that.

Q Did you ever discuss with Dr. Centor what influenced his changing his opinion?

A I probably did, but I don't remember exactly what he said.

Q Did Dr. Mansheim give you any advice on future dangerousness?

[99] A Dr. Mansheim really didn't have anything much that could help us. I remember Mr. Smitherman and I talked at length with him, I mean even right on up to the testimony in the penalty phase hearing. But I don't

think Dr. Mansheim had anything really that we could draw on much to help.

Q He couldn't have said that Terry would not be a danger in the future?

A No.

Q He was your expert, and of course you didn't have to put him on unless you wanted to. Do you know what he would have testified if asked maybe on cross-examination about future dangerousness?

A He probably would have testified that Terry was likely to exhibit violent crimes in the future.

Q Is that one reason you steered away from psychiatric mitigation evidence?

A Exactly. I had tried to find something, anything, a sliver of psychiatric evidence that would help on anything the whole time I had had the case.

And we had come up with nothing the whole way, and I didn't want to beat a dead horse on it. I didn't have anything that was going to help us, so I didn't even want to go any further on it.

[100] Q On the FAS, have you ever had occasion prior to this to make the argument that somebody is a drug addict or somebody is an alcoholic?

A FAS is what?

Q Is the fetal alcohol syndrome.

A Are you asking me if I have ever used that as a defense in a case?

Q To try and argue mitigation that somebody has a drug problem or somebody has an alcohol problem and you ought to feel sorry for them?

A Any number of times. Any number of times from J and D Court all the way on up to Federal Court and here in Circuit Court.

Q And based on your experience, is that a very successful argument?

A No.

Q Now you said you really concentrated on the guilt phase. Was that because you knew what you were facing at the penalty phase from the Stroud case?

A Yes.

Q So you hoped to cut it off and not even have to deal with the heinous –

A We wanted to try to cut it off if at all possible at the guilt phase. If they had come back [101] with anything other than capital murder, I think we would have considered it a victory.

Q They asked you about challenging the confession. Do you recall, didn't the police officers testify that Terry said on the second tape that everything was a dream and everything was an illusion?

A He had kind of gone back and forth. As I recall, he had written a letter to the chief of police, he gave a confession, they had a taped statement from him.

And then I think he talked with his family and then recanted it. And the whole time he was claiming he was

having these dreams or visions or hallucinations or whatever.

Q What about the issue about you should have gone around and found people to testify about prior injuries. You said you did look for some people and all you got was hearsay.

But didn't you at that time, at the time of trial, didn't you have Dr. Oxley's autopsy?

A Yes.

Q And you had Terry's confession that said, I hit him in the chest and he started gasping [102] for breath. Was there anything, did you have any information, even though you tried, was there any information before you?

You had his confession that said when I struck him with the mattock he gasped for breath, and Dr. Oxley's report, was there anything to alert you to go looking and try and find job injuries or falling down drunk or something like that?

A It was an avenue we pursued. After all, you have a man being dug up about four or five months or longer after his death, for lack of a more eloquent way to put it.

We tried to find people who could testify as to those alternative theories, and they were all dead ends. And the problem is, even Terry's confession, I am not a doctor, but I can imagine a man with a collapsed lung or punctured lung is going to be gasping for breath. And that in itself almost corroborates the corpus delicti.

Q But still you attempted because of the foul-up between the doctors to try and create –

A Oh, yes.

Q You tried to highlight that, to sow some doubt, hopefully?

A We wanted to run with whatever had a [103] chance of working. That was the one thing that had a chance of working.

Q I think you said you didn't recall who they were, but Terry did give you the names of some witnesses?

A Yes, Terry, and I think possibly also his mother.

Q Did you or Mr. Smitherman talk to these people?

A Yes.

Q And also the thing about correctional records, employment records, you have already touched base partially on this, school records, juvenile records?

A Well the other thing on this, there were really two sentencing hearings for him. There was the penalty phase with the jury, but then there was like about a six-week lag before a final sentencing.

Q By the Court?

A By the Court, where the Court had ordered a thorough and comprehensive presentence report. So while I couldn't get these things, I felt like I couldn't get them, while Mr. Smitherman or I might not have had access to them, the probation officer would.

[104] And anything like his prior juvenile history, educational background, employment, military service, all those things were gone over with a fine tooth comb in the presentence report.

And that is true not only for Mr. Williams' presentence report but any felony presentence report that is prepared in Virginia.

That is why reports happen, the judges want to know as much as possible about the man they are getting ready to sentence.

Q Besides the pathologist, you have been criticized for not getting a private investigator or expert on coerced confessions or an expert on mitigation. Did the state of the law at that time, did that allow for any of those appointments to indigents?

A Basically, no.

Q And based on your experience in this area or in this jurisdiction, were they routinely appointed or denied?

A Routinely denied.

Q Did Lula Williams, did you talk to her, the mother?

A Yes.

Q Did she ever make known to you that she [105] had supposedly been an alcoholic during her pregnancy?

A No. We had asked her for anything, anything that would help Terry. I don't know that we zeroed it down to specific areas like substance abuse, mistreatment as a child. We just shotgunned it and said is there anything that you know of that can help Terry, if so please tell us now.

Q Did you see any reason to get fingerprints off the letter to see if that is what was sent to the police chief?

A No.

Q Why was that?

A The police, as I understood it, had already made an effort to determine what inmate had sent the letter. And as I recall, Terry had pretty much admitted sending the letter to the chief.

Q Did Terry admit it to you?

A As I recall, yes.

MR. CONDON: That is all I have at this time, Your Honor.

THE COURT: Mr. Powers.

REDIRECT EXAMINATION

BY MR. POWERS:

Q Mr. Motley, you handled the appeal with [106] Mr. Smitherman, and I take it that you divided up issues just like you did with the trial, with you having primary responsibility for some and him with other issues; correct?

A Yes, we split it.

Q Do you recall how that split, what you handled and what he handled?

A Not offhand, I don't recall which people briefed what. I sat down with the brief over the weekend and looked at it again. And really from the writing style and

everything else, I can't really remember more than one or two that Mr. Smitherman specifically argued and the rest that I had. I really can't recall.

Q Did you have access to a witness list from the state?

A Basically, yes. Not a witness list per se, but we knew that the guts of the Commonwealth's case was going to come from the detectives who took the confession and also the medical experts.

Q Didn't you go and seek to either get a witness list or the subpoenas that the state had issued to find out who the witnesses would be?

A Yes, we did.

Q And so you found out who they would be [107] calling?

A Yes.

Q How much in advance of the trial?

A I imagine probably about a week or so.

Q Did you make any attempt to interview the people on that list?

A As I recall, we did. I don't know that we got all of them, I can't recall who talked with whom. We knew that the main ones were of course going to be the detectives, and I think we spent the most time talking with them.

Q How about for instance John Whittle and Debra Grant, the people who testified concerning finding the body and who were there that evening, you didn't interview them, did you?

A I can't recall whether we did or not.

Q Now this presentencing report, is it your testimony that the presentencing report would get into things like child abuse and youth and juvenile services and Terry's record in correctional institutions and whether his good conduct –

A Yes, generally it touches on all those areas.

Q Now that presentencing report that you have testified, that doesn't go to the jury, the jury [108] never sees that?

A No.

Q So those issues that you were relying on the presentence report were never presented to the jury, were they?

A No.

Q That was your job to present any of those issues to the jury, wasn't it?

A Yes.

Q But you didn't do it?

A Well we presented what we had.

Q But you didn't make any effort to get those reports, for instance?

A Well as I previously told you, a lot of those just weren't available to us under state law at the time, and may still not be.

Q And in fact when you refer to a presentencing report, you are really talking about a post-sentencing report, aren't you, that goes to the judge?

A No, not really. It is called a presentence report. Some states may call it a post-conviction report.

Q Okay. Now fetal alcohol syndrome is something that you have only become aware of [109] recently, but I think it is your testimony that you back at the trial in 1986, if it had come to your attention that Terry Williams' mother was an alcoholic and was drinking heavily at the time she was pregnant, you would know that that would be something that would be bad, wouldn't you?

A Yes.

Q And you would also know that that would be something that you would want to bring to the attention of the doctors, wouldn't you?

A Yes.

Q If you had known it?

A If we had known.

Q But you didn't know it?

A No.

Q You recall talking to Dr. Mansheim before the trial, do you know how long that was, your meeting with Dr. Mansheim?

A I don't recall. As best I can remember, I had several meetings with him.

Q Did you meet with him about the same period of time that you testified that you met with Dr. Centor?

A Yes. Kind of talking with both, one or the other.

[110] Q Now testifying today, Doctor – everybody will be a doctor before I leave today.

A I have been called worse.

Q Testifying today, you can't really pinpoint when your depression started, can you?

A No, I can't.

Q And you can't recall ever asking Dr. Mansheim for his opinion regarding future dangerousness, can you?

A I really can't. As noted, I think I just threw out a blanket request for anything that would help Mr. Williams.

Q Just like you did with Mr. Williams' mother, do you know anything that will help us?

A Right. Is there anything that you can possibly think of no matter how remote you may think it is.

Q Did you know that Dr. Ryans and Centor would testify on the issue of future dangerousness before they testified?

A Yes.

Q When did you know that?

A I could expect it. I –

Q Not expect or assume, but did you know?

A Yes.

[111] Q How did you know, and when did you find out?

A Well, I mean, as soon as they had come up with nothing that would help Terry, I figured that they would end up being witnesses for the Commonwealth sooner or later.

Q So that was an assumption you made, not something that was communicated to you in writing?

A Right; that was an assumption.

Q Or no phone calls?

A Right, purely an assumption. And we also had as I said, both sides were under discovery order, and the Commonwealth had already, I don't know that it was so much a formal answer to discovery, but it was just something we knew was down the road, that they would both end up being witnesses.

Q But you didn't make any attempt to have Mr. Mansheim stay at the trial in order to assist you when they testified with what you assumed they would testify to?

A No.

Q Did you give any notice to, written notice to the Court prior to trial that you would bring Terry's – that you would have an insanity plea of any kind?

[112] A No.

Q Or to the prosecution?

A No, because under the rules of court, if you have an insanity defense you have to file a written pleading.

Q I have never seen that, and I just wanted to make sure.

A We didn't have one. If we had had an insanity defense, believe me it would have been the first pleading to hit the file.

Q And you never also made any notice pursuant to the statute that you would be presenting psychiatric testimony regarding mitigation?

A No.

Q Because you never did, did you?

A We didn't have anything. If we had it, it would have been there.

Q Were you aware that the statute regarding expert psychiatrists and psychologists about who their report could go to, that that statute had changed July 1?

A Of what year?

Q Of 1986 right before the trial.

A Yes.

Q And were you aware that the statute was [113] not complied with and that Dr. Mansheim supplied his report to the prosecutor?

A No.

Q Well you have a copy of doctor Mansheim's report that had a cc to Mr. Fuller, didn't you?

A Yes.

Q But you didn't bring that to the attention of the Court or object to it, did you?

A No. And even if I had, it probably would have been ended up moot because under the discovery rules

we would have had to turn over anything we had as far as expert testimony.

I couldn't sit on it or put it under the bed because it was adverse to us. In other words, anything I had like that I would have had to turn over to the Commonwealth anyway and same situation for them.

MR. POWERS: I have no further questions.

MR. CONDON: Just a couple more.

THE COURT: Yes, sir.

RECROSS EXAMINATION

BY MR. CONDON:

Q When you talked to Terry and his mother [114] and whoever else about anything that can help, did any of them mention the fact that his parents were alcoholics or the problems in childhood or anything like that to you?

A No. Every indication we had was that they had tried to provide Terry with a good, loving stable Christian home. We didn't hear anything that Social Services had to be called in or anything of that sort.

Q So Mrs. Williams didn't say, I was an alcoholic at one time?

A No.

Q And she didn't tell you that my husband was an alcoholic and used to mistreat the children?

A No.

Q And when you say you asked them for anything that can help, was it just that question or did you say anything in his background or his growing up?

A I think it was both questions.

MR. CONDON: That is all I have, Your Honor.

MR. POWERS: No questions, Your Honor.

THE COURT: You may step down.

* * *

[125] **ROBERT J. SMITHERMAN** was called as a witness, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MARTORANA:

Q Could you please state your name for the record?

A Robert J. Smitherman.

Q And Mr. Smitherman, you are an attorney in Danville; correct?

A Yes, I am.

Q And what firm do you work with?

A Daniel, Vaughan, Medley and Smitherman at this time.

Q I gather from that name that you are a partner in the firm?

A That is correct.

Q How long have you been with the firm?

A Ten years, well eleven years in August of this year.

Q And was your job with the firm your [126] first job out of law school?

A Yes.

Q Where did you go to law school?

A William and Mary, Marshall Wythe School of Law, William and Mary.

Q When did you graduate?

A 1984.

Q Do you recall being appointed to work on the Terry Williams case as to assist the other defense counsel that had been appointed?

A Yes, I do.

Q And do you recall when that appointment was?

A I don't recall the date. I think it was about a month before the trial, but I am not sure of the date.

Q If I told you that the records show that the appointment came from the Court on August 29, 1986, would you have any reason to disagree with that?

A No, I would not.

Q Does that sound about right?

A I think so.

* * *

[129] Q Now prior to being appointed to this case, had you worked on any capital murder cases?

A No, I had not.

Q Had you worked on any murder cases?

A No.

Q Had you worked on any felony cases?

A Yes.

Q As a court appointed defense attorney?

A As a court appointed defense attorney.

Q And what types of felony cases had you worked on prior to being appointed to the Terry Williams case?

A Grand larcenies, just your normal felony cases that did not – I don't believe I ever worked on a murder case beforehand. May have worked on maybe a malicious wounding or two.

I think I worked on at least one or two rapes or some other sexual offenses before that, but nothing that involved murder.

* * *

[131] Q . . . Now when you started working on this case, did you meet with Mr. Motley, and was there any discussion about how you were going to divide up the work on the case?

A Yes, I met with Mr. Motley. How we were going to divide up work was he gave me certain assignments to

do to talk to witnesses, etcetera, and I did that and then reported back to him.

* * *

[143] Q I understand. Aside from interviewing Dr. Hardy and some fact witnesses, some of them you think are people who found the body, was there any other fact witness or expert who you spoke to prior to the day of the first day of trial?

A I believe I spoke with the police officers before the trial, the detectives that went to discuss with Mr. Williams the letter that he had sent. And I might have even had a very brief discussion with the police chief before then.

Q Anyone else you can think of sitting here today that you spoke to before the first day of trial?

A Again I believe I spoke with – I don't know if I spoke with the witnesses concerning Mr. Stone's prior injuries or not. I do remember that someone did, and I don't know if it was myself or Mr. Motley.

And I spoke with his mother. I might have spoken with some relative of Mr. Williams. I believe I spoke with her on the phone once or twice before then.

Q Her meaning?

A The mother of Mr. Williams.

Q The mother?

[144] A Yes.

Q And you spoke to her on the phone?

A I believe so.

Q Did you speak to any other family members if you can recall?

A I believe – I don't recall. I might have, because I believe Mr. Williams' family members would call us occasionally with more information.

I believe we were getting some information from Mr. Williams' family members because Mr. Williams of course was incarcerated and was not able to investigate himself.

And so I believe that some of Mr. Williams' family was calling. I don't know if I spoke with them or Mr. Motley, but I believe that is how we got the information.

Q Did you ever visit Mr. Williams' home where his mother lived on Henry Street?

A I don't believe so.

Q Had you heard back then when you were representing Mr. Williams the name Bruce Elliott?

A The name does not sound familiar to me. I don't know if at that time I knew of a Bruce Elliott or not. The name does not sound familiar to me at this time.

[145] Q Did you speak to any of the two psychiatrists or one psychologist that were involved in this case, meaning Dr. Centor and Dr. Mansheim and Dr. Ryans?

A I did not. I believe, again I believe that Mr. Motley was the person who was dealing with specific issues involving psychologists and psychiatrists.

Q Did you find it necessary during this time to familiarize yourself with what the psychiatrists were saying and what they were reporting about Mr. Williams?

A Yes. I don't remember – I believe I got all of the reports or reviewed Mr. Motley's file on the reports from the doctors. I know I looked at some reports and also a couple of letters from the doctors.

Q Did you consider any of these doctors to be experts appointed to help you as defense counsel in this case?

A I know that Dr. Mansheim had been appointed for Mr. Williams as under the Ake requirement that he had an independent psychiatrist appointed for him. So I assume that he was appointed for Mr. Williams and to assist us.

[146] Q And it is your testimony that it was basically Mr. Motley who was working with these experts?

A That is correct. Mr. Motley was already working with them when I came into the case, and I believe that is why he continued with them.

Q Were you aware that Dr. Centor had sent a report that said that Terry Williams, there was a low probability that he would be a continuing threat to society? Do you recall that report?

A I recall reading reports, I don't recall the specifics of any of them, of the reports themselves. I don't recall the specifics of any of them except I think Dr. Mansheim.

Q Do you recall the testimony of Dr. Ryans and Centor during the penalty phase of the trial?

A I recognized them when I walked into the witness room, but specifically, no.

Q In terms of the actual trial, did you and Mr. Motley have a game plan as to who would examine which witnesses?

A Yes. He had said you do these people and I will do these people. And, again, he dealt with all of the psychiatrists, psychologists.

I think I asked questions of a [147] few fact witnesses and cross-examined a few fact witnesses. And I cross-examined the medical examiner at the hospital, Dr. Hardy I believe you said his name was.

Q Did you basically examine and cross-examine those individuals that you had talked to prior to trial?

A I know I did in the case of Dr. Hardy. I don't think so on the fact witnesses because I think I had talked – I only remember interviewing or cross-examining only one or two of the fact witnesses, and I think I talked to more than that.

Q Do you recall when you started preparing for the penalty or sentencing phase of the trial?

A Well it was part of the case, and so, you know, I was doing research and talking to people, talking to – I think mainly I did talk to a couple of family members on the phone, as I testified before, I think, about that. And I had discussion with Mr. Motley about that before the case, before the trial. I don't know when.

* * *

[154] Q I have a sheet of paper from your file that has some names on it. I am not sure what it means, maybe I can show it to you and see if this may refresh your memory as perhaps people you spoke to. And I am not sure what this means.

A I am not sure if I am going to remember either, but. This appears to be a list of people that were subpoenaed by the Commonwealth.

[155] I imagine what I did was they had subpoenaed them so many days ahead, and I probably went down to the court and wrote these down from their subpoena request.

Q Okay, great.

A That is what this looks like. And the reason I say that is because it has their addresses, including Dr. Centor and Dr. Oxley.

Q And there is Dr. Ryans there, too?

A Dr. Ryans.

Q In terms of the sentencing or penalty phase, did you and Mr. Motley have a strategy of how you were going to approach the penalty phase?

A We had discussed of course many, many times. And the reason that I – the main reason that I made in my argument and the main reason that I still think Mr. Williams should not have gotten the death penalty was that he turned himself in.

In fact, this murder would not have even been – this death would not even have been determined a murder unless Mr. Williams confessed.

And that showed remorse and that showed something that I was hoping the jury, and Mr. Motley was hoping, the jury would say this person deserves some consideration. And that was our main [156] thrust, that was our main consideration on the penalty phase.

Q Any other consideration, minor perhaps, that you discussed with Mr. Motley?

A Putting his mother on the stand, family members. I think we put – I didn't read through the whole transcript recently, but I think we put more than just Mr. Williams' mother on the stand, some other family members on the stand.

Q Do you recall what you and Mr. Motley attempted to talk about in terms of attempting to do when you put these people on the stand?

Was it for particular issue or issues that you wanted to put his mother and perhaps other family members on the stand?

A It is hard to differentiate between what I discussed with Mr. Motley at the time and what I now would assume that I did something for.

And either I discussed with or I assume now that we put his mother on the stand and his other family members on the stand to show the jury another face. This is a family member, this person will feel great loss if they do sentence Mr. Williams to death, things like that.

Again I don't know, contact [157] between parents and contact between relatives, again I don't remember if we discussed that or if we did it without discussing it.

That was certainly a minor consideration or even more than a minor consideration; it was certainly a consideration.

I don't remember if we discussed anything else, and I would have to think about any other considerations that we had.

At this time I can't think of anything else but the normal ones concerning the appearance of the family members and that type thing.

Q Do you know if you and Motley spoke about putting on as a witness in the sentencing phase Mr. Williams' daughter?

A I don't remember. I remember that every single person we put on the stand, the Commonwealth's attorney would remind them of these horrible, kept using the word horrible and terrible crimes that Mr. Williams had done, did you know that he did this and did you know that he did that.

And after a couple of witnesses, it almost seemed like we were assisting the Commonwealth in reminding the jury again and again. And I believe that there were other family members [158] who were there to testify, and one who I think even wanted to testify.

But it kept being so repetitive that the Commonwealth's attorney would bring up all these other crimes Mr. Williams had been convicted of, and it was like we

were doing more harm than good reinforcing all of these things in the jury's minds.

Q Is it because of that concern that you did not call any other family members who were available?

A I believe there were one or two others available at least that we did not call because that was a concern.

Q Anyone else, non-family members that you did not call because of that?

A May have been a friend or two; I don't remember.

Q In terms of what you did personally to gather evidence in the sentencing phase, I would like to just concentrate on that. Did you speak to anyone other than family members?

A Of course we talked to Mr. Williams quite a few times.

Q And what did you say or what did you ask Mr. Williams?

[159] A About family and who should we get to testify for you. In case this happens, who should we get, that type of thing.

And he gave us some names, I think we got names of family members that way. And asked him several times in several meetings before the trial and during the trial.

Q And he gave you some names; is that correct?

A I think so.

Q So you spoke with Mr. Williams himself and some of the family members. Anybody else who you spoke to?

A I don't remember. There may have been one or two friends of Mr. Williams or friends of the family here that we spoke to.

And I don't remember whether that was before trial or at trial, but I remember speaking to – I remember that I talked with someone who was not a family member.

Q Did you attempt to obtain any documents that might be relevant on the sentencing phase or on the mitigation issue in the sentencing phase? For example, did you attempt to get any school records of Mr. Williams?

[160] A I don't remember doing that, no. I remember something about school came up in some of the reports of the psychiatrist and psychologist, but I don't remember myself attempting to get school records.

Q Did you attempt to get any medical records of Mr. Williams?

A I do not remember.

Q I am sorry, you don't know?

A I do not remember. I don't know if I did or not.

Q Do you recall if you attempted to get any prison records of Mr. Williams?

A That would have been in his presentence report and in other reports by the psychiatrists and psychologists. I don't think I contacted any prisons for that information.

Q How about any, did you attempt to get any information from Youth and Family Services on Mr. Williams?

A I don't remember doing that.

Q Did you know that Mr. Williams had been taken away from his parents at a young age and been put in foster care for a few years?

A I don't know whether I knew that at that [161] time or not. I think there has been something about that in the presentence reports, but I am not sure.

Q But the presentence report is put together by someone else?

A Correct, and that would have been after the trial phase.

Q Did you attempt to get any employment records of Mr. Williams?

A I remember talking to Mr. Williams about his employment, and he did not indicate there was that much employment at all. And I don't think we followed up on it because I don't believe he had that much employment history that he talked about.

We maybe talked about that with mother or family members. I remember discussing it with someone else, as well, but no records, no.

Q Do you recall discussing with Mr. Motley about obtaining any of these records that I mentioned – correctional, medical, school?

A I know that we discussed education and we discussed his, the information that was given in the psychological reports or psychiatric reports, but I don't remember discussing – I don't remember whether we did

or not other than his education and his employment background.

[162] Q Do you recall that Dr. Centor and Dr. Ryans both testified at the sentencing phase that they believed there was a high probability that Mr. Williams would be a future danger?

A I remember them testifying. I remember at least one expert, I guess that those would have been the only two experts that testified at that point. I remember one of them at least testifying of future dangerousness.

I remember that evidence coming in. I don't remember who did it, I don't remember which doctor or whether they both did. I don't remember.

Q And is some of the reason why you may have trouble remembering is because Mr. Motley was handling this as opposed to you?

A Maybe so, because he was handling all the questioning concerning this.

Q Do you recall if it surprised you that these doctors came in and said Mr. Williams would be a future danger?

A No, it would not, based on the information that I had.

Q I think I had asked you earlier were you aware that Dr. Centor had said in a report that he [163] would not be a future danger?

A I remember you asking the question, yes.

Q Let me show you a document that has been marked Petitioner's Exhibit 2, and I have highlighted this, but I will just ask you to take a look at the document itself without the highlighting and see if you recall seeing that report.

A I remember seeing a report, but this doesn't look like a full report. This is just a letter to Mr. Motley.

Q Do you remember seeing that letter?

A I looked through Mr. Motley's file when we first started the case. And I assume this was in it, but I don't remember specifically seeing this letter, no.

Q Do you remember ever seeing anything like you see in this last paragraph that says that there is a low probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society?

A I don't remember seeing anything like that.

Q So what you are saying is that when Dr. Centor and Dr. Ryans said that he would be a future danger or a continuing threat to society, you were [164] not aware that at one time they had, at least Dr. Centor had a different opinion?

A it has been nine years ago, and I am sorry. I have a vague recollection of Dr. Centor who testified here in Danville and of course all over the state quite often, in one case in which I was involved testifying.

And someone talked to him, and he said – because there was an inconsistency – and he said, yes, but I didn't realize this prior background report.

I don't know if that was part of this case or not, so I had better say I don't know. But that is a vague recollection. I don't remember if I was surprised or not.

I guess that is not an answer to your question. The first part was not an answer to your question. I don't remember if I was surprised or not.

But by the time he testified, I was not surprised that he said what he said, because Dr. Mansheim had also said it, and we were very concerned about that.

Q And you don't recall if you saw this letter and knew at the time that he testified that at [165] one point he had said there was a low probability; is that correct?

A Again I have that vague recollection that I prefaced in my last remarks, so I will say I don't know whether I knew that at that time or even saw that letter or not.

I did look in Mr. Motley's file, and if it was in there I probably read the letter, but I don't remember if I saw it.

Q And do you recall if you and Mr. Motley had discussions about whether to put on any of these experts yourself of Mr. Mansheim or Dr. Centor or Dr. Ryans or was that pretty much Mr. Motley who was making those decisions at that time?

A Are we talking about the penalty phase?

Q The penalty phase.

A I remember a discussion a few days before the trial, because I was only appointed a month before, so I can't remember if it was very close to trial or not.

But I think it was fairly close to trial. And Mr. Motley, either I met him down here or I talked to him on the phone. And we said – he said that he had gotten a letter or talked to Dr. Mansheim. And I believe he said he had gotten a [166] letter, but I cannot be for sure.

And he said that we absolutely cannot use him on the penalty phase because Dr. Mansheim, I believe Mr. Motley's words, said that this was the scariest guy he had ever talked to, that he was of extreme future dangerousness.

And I believe that was in a letter, but I cannot – I did look through my file to see if I had that letter and I don't have it.

But I remember seeing that, but I do remember having that discussion with Mr. Motley that we could not use Dr. Mansheim because of that.

And of course the other two doctors testified for the Commonwealth, so we wouldn't have called them for that reason.

Q Dr. Centor and Dr. Ryans testified for the Commonwealth. Because they testified for the Commonwealth, you would not have called them? Is that what you meant?

A At the point in the trial, I guess that is what happened. At least by your questions I am pretty sure they both testified at the penalty phase, so we wouldn't have called them, we would have cross-examined them.

* * *

[168] Q So did you have a feeling at that time or a thought that whatever their evaluation was of Mr. Williams, it was probably going to help the Commonwealth more than your side?

A Well I wasn't appointed until after they reported, I think. So I don't know if I can answer that question. But their reports certainly indicated that they helped the Commonwealth more than our side.

Q In terms of your closing argument at the sentencing phase?

A Yes.

Q You and Mr. Motley both gave a closing argument. Do you recall that?

A Yes.

Q Did you discuss with Mr. Motley and he discuss with you what you were going to say before you said it?

A That was an interesting situation in that I don't think we discussed the closing argument. Well, let me back up and ask you to clarify the question. Are you talking about the sentencing phase?

Q Sentencing phase; correct.

A We had both made an argument on the [169] penalty phase, but I don't believe we had discussed me making any argument at the sentencing phase.

And I believe the Commonwealth's attorney suggested that both of us do. And he said that he didn't want any problems down the road.

And so about an hour before we made that argument, I started developing an argument. And we did discuss at that time, but until that time I believe Mr. Motley was going to make the final argument.

* * *

[172] And we were very careful not to mention anything about any opinion of Dr. Mansheim at that point, because we were afraid that the Commonwealth, the door would be open for him to render another opinion.

All we asked was a fact question about what Terry Williams had said to him. In retrospect that probably was hearsay because he was not basing any opinions on it.

So but it was allowed to be admitted into the record, something about bullets. We were very careful that that was the only thing we asked him.

We were not asking opinions because we were afraid of what Dr. Mansheim would say otherwise. So that also makes me think, makes me remember, refreshes my memory about the discussion with Mr. Motley.

Whether a letter exists or not, I thought I saw a letter, but I can't say that for sure, because I don't have one in my file.

[173] **CROSS EXAMINATION**

BY CONDON:

Q Mr. Smitherman, just to clarify, would this be a correct characterization, you were [174] basically second chair to Mr. Motley in this case?

A Yes.

Q He was the experienced capital murder trial lawyer, you had never tried one?

A That is correct.

Q Did he essentially make all the strategic and tactical decisions, maybe after discussions with you, but he called the shots?

A Yes.

Q Do you recall anything where you made a final decision without consulting him?

A No, I doubt if I made any final decisions at that point, but certainly not without discussing it with Mr. Motley.

Q Let's jump to the appeal in the spring of '87. I was handling for the Commonwealth, and I remember dealing with you. Do you remember the breakdown on the work load on the appeal? Did you all split it up or did you handle most of it or what?

A I think I handled a lot of the appeal; I handled quite a bit of the appeal.

Q Would you have handled more than Mr. Motley?

A Yes. Mr. Motley is a one-person firm, and I had resources where I could get documents [175] printed, and I had a library, and I had actually a lot more time than Mr. Motley.

Q You all raised a number of issues. Do you think you did most of the research on the assignments of errors in the argument?

A I think so.

Q And you talked about the strategy at the guilt phase as muddying the water. Did that have anything to do with the fact that was your strategy because of the confession that you were dealing with where Terry had said he had hit Mr. Stone with the mattock and he had taken the wallet?

A Yes, that was the real problem with the case was that as I said I think that the jury should have considered that, and I hope they did consider that in the penalty phase.

But he basically admitted to a murder that had not been investigated as a murder. And then they turn around and dig the body up and say you are right, you did this, and then they charged him with capital murder, which I thought was terrible.

Q You say you did find, you believe you found some people who corroborated Jannadean Stone's testimony that her father always kept the wallet in [176] the pocket.

Let me ask you this, in light of the fact that your client said he took the wallet, twice he said he took the wallet out of the pocket, were you really looking for something to the contrary?

A Well again, since we knew within a week before the case that the evidence was going to come in, and it was not going to be suppressed, that it was going to be very difficult to show something other than what Mr. Williams said.

Supreme Court, U.S.
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JUN 21 1999
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(6)

No. 98-8384

In The

Supreme Court of the United States

TERRY WILLIAMS,

Petitioner,

v.

JOHN TAYLOR, Warden, Sussex 1 State Prison,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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[Continuation of Testimony of Robert J. Smitherman]

Q Thank you. You said that Mr. Williams and the family members gave you some names. As far as you can recollect, do you think either you or Mr. Motley either got in touch with these people or at least attempted to get in touch with all the names he gave you?

A Yes. I know we got in touch or attempted to get in touch with everyone that Mr. Williams told us about.

I remember talking with him several times, more than twice, about people. And they led us to family members, and I don't know if we got in touch with every single person the family members said get in touch with, but I think we tried.

* * *

[TESTIMONY OF DR. PAUL A. MANSHEIM]

[199] Q Were you asked to evaluate Mr. Williams [200] in terms of mitigation?

A Yes.

Q And what does that mean to you when you are asked to evaluate someone in terms of mitigation?

A In this case it meant could anything be uncovered that would persuade the Court that it would be appropriate to have a decreased penalty.

Q And did you evaluate Mr. Williams for mitigation?

A Yes.

Q And what process did you use to determine whether or not you could discover any mitigating circumstances?

A Mostly it was in talking with Mr. Williams himself. He told me some things he thought were important and relevant.

Q Did you go any further than that, like talking to other people or individuals to learn anything else that might help in mitigation?

A Not beyond reviewing the materials that were sent to me, and I didn't call his mother for example or his teachers in school or that sort of thing.

Q Do your records reflect who sent you materials?

[201] A Yes. As far as I can tell, everything that I had was sent to me by Mr. Fuller.

Q There is a letter that is probably in a stack, I know it is Exhibit 3, also, Petitioner's 3, from Mr. Fuller to you dated September 2, 1986. And I can bring this over, unless you maybe –

A I would rather you brought it over.

Q If you will take a look at this Exhibit 3 and tell me if you recall seeing that?

A Yes.

Q There is some information in this letter about Mr. Williams. And my question is, did you consider this information in your evaluation of Mr. Williams and in particular in your evaluation of mitigating circumstances?

A I don't have any record of having used it. In other words, I didn't refer to it in my report, and I don't have any independent recollection of having used it.

Q There is a sentence in there towards the end of the next to last paragraph that says: When the inmate asked if he was going to admit – the he I believe is referring back to Mr. Williams – is going to admit the murder in court, the defendant said, no, he was going to say he was insane. Do you recall if [202] that played a part in your evaluation of Mr. Williams?

A Well I can only assume that it made some impression. I mean, for somebody who is allegedly going to plead insanity about something, I guess that leaves an impression.

Q Is that significant that someone is actually able to articulate that they are going to plead insane, insanity?

A It may or may not be. Sometimes it means a person is sophisticated enough to know that that is a possibility. Sometimes it means that the person realizes that his own personal extensive psychiatric history has some bearing on the criminal case. Sometimes it is wishful thinking.

Q Sitting here today, do you recall what part that might have played in your evaluation?

A No, I don't.

Q Did anyone ask you to draw any opinions with regards to whether or not Mr. Williams would be a future danger or continuing threat to society?

A No.

Q And would it be correct to say that you didn't file any report on that issue, did you?

A That is correct.

[203] Q And you didn't discuss that issue with Mr. Motley or Mr. Smitherman did you?

A I have no recollection of discussing it with them. I assume if I had discussed it with them, they probably would have asked me some questions at one of the proceedings.

Q Do you recall having any discussion with Mr. Motley about what you thought of Mr. Williams and specifically that you thought he was a very dangerous person?

A No.

Q Do you recall putting that in writing?

A No.

Q Would you agree that your testimony on mitigation – first of all, let me back up. Do you recall your testimony on mitigation?

A No, not specifically.

Q Would it refresh your memory if I told you that you testified about Mr. Williams telling you he removed bullets from a gun during one incident and that he thought on another conviction that he was unfairly convicted?

A Yes, those are in my report, and I imagine I testified about those things, but I don't remember saying anything else about it.

[204] Q And that information you got from Mr. Williams, correct?

A Yes.

Q And you are just relating what Mr. Williams told you; correct?

A That is right.

Q There is no professional, expert opinion that you are drawing there, is there?

A I don't think anybody asked me to, but no, the answer to your question is no.

Q Did you have any information with regard to Mr. Williams' history in terms of his history of incarceration?

A I had a history that I got from Mr. Williams that told me about various convictions that he had, but I didn't have anything beyond what is in my report.

Q Did you have any information about whether in previous incarcerations he had been a model prisoner or something other than that?

A Did not have any information about that.

Q Did you have any information on his past history in terms of his family life and how he was raised and brought up by his parents?

A Yes, I had a little bit of that. I knew [205] that he had had a pretty chaotic family upbringing, I knew that there had been a family fight in which he had had a head injury when he was quite young. And I knew that he left school after having a pretty unsuccessful academic career, so I knew those things.

Q Did you hear or read anywhere that he had been mistreated as a child and beaten by his father?

A Yes – well I had the history that he was hit in the head with a chair wielded by his father-in-law at the time he was living with his wife. But I don't think I had anything specific about his biological father.

Q Did you have any information with regards to whether or not he was ever taken away from his parents when he was a child and put into foster care?

A There is nothing in my report about that, and I don't have any independent recollection of it.

Q Did you have any information in terms of his past employment?

A I think I did, yeah.

Q Did you get that information from Mr. Williams himself?

[206] A I remember something about Mr. Williams having some difficulty with employment, and I think that was in the material Mr. Fuller sent me, that he had lost a job for unsatisfactory performance on the job, I remember that.

Q Did you have any information about his past school history, his schooling?

A I knew from his account that he had a lot of difficulty in school and that there had been a number of grade failures, problems with reading, and he felt that school was a pretty unsuccessful experience for him.

Q Dr. Mansheim, have you ever heard of fetal alcohol syndrome?

A Yes.

Q And had you heard of fetal alcohol syndrome in 1986 at the time you were evaluating Mr. Williams?

A Yes.

Q Back in 1986 or around that period of time, had you ever diagnosed anyone with fetal alcohol syndrome?

A Yes.

Q Do you know if that was before or after you saw Mr. Williams?

[207] A It was before I saw Mr. Williams.

Q Did you have any information when you were examining Mr. Williams to lead you to question whether he might be a victim of fetal alcohol syndrome?

A No.

Q What information would have been pertinent to you in order to raise a red flag for you that maybe you should evaluate him for that?

A Probably the most pertinent information is that the person has some facial abnormalities. There is a sort of – the nasal folds are peculiar and the lips are rather thin.

Q Would you agree that that type of abnormality is easier to see in a younger person than an older person?

A I think it is relatively easy to see whatever age person it is. I am not very good in recognizing these facial syndromes, but even I can see if there is something there. It is pretty obvious.

Q Does it always have to be that obvious where fetal alcohol syndrome is concerned?

A As far as I know, if they don't have the facial abnormalities, then it is not fetal alcohol [208] syndrome. Otherwise it would just be a question of judging fetal alcohol syndrome on the basis of history of alcoholism in utero and history of some cognitive difficulties or below-average intelligence. To me that would be pretty non-specific.

Q Did anyone give you information about whether Mr. Williams' mother had drank substantial quantities of alcohol while Terry was in utero?

A Right. There is nothing in my report about it, and I don't have any independent recollection of it, so I think the answer to that is I didn't know.

Q Are you saying that at the time you examined Mr. Williams you did not see any evident facial abnormalities that would lead you to that diagnosis?

A No, I did not.

Q If someone had told you that his mother had drank quite a bit, would you have done anything different in your evaluation?

A I certainly would have thought about the possibility of fetal alcohol syndrome. I probably would have at least looked up and gone as far as looking up in a textbook exactly what the agreed upon [209] diagnostic criteria are. And I hope would have brought it to the attention of the defense attorney.

Q Would you consider if you had a diagnosis of fetal alcohol syndrome that that would be significant for mitigation purposes?

A I think it would be a matter of the Court's judgment as to whether it was, but it would be something one could bring to the attention of the Court and let the Court consider it.

Q In your opinion, can psychiatrists or psychologists or other experts predict future dangerousness or future threat to society with any degree of certainty?

A I think if it is properly limited. For example, if it is a question of peoples past history or behavior in certain situations, frequency of offenses, the nature of their offenses, their youth, their intelligence, their educational level, their training, their living in a stable family or home situation, their having some sort of investment in living a straight life, I think if it is a question of looking at those kinds of parameters, then I think it is possible for mental health professionals to say things about dangerousness that are relevant.

Q But you would agree that they cannot [210] guarantee that their prediction is going to be correct or accurate?

A No, no psychiatrist can guarantee a prediction about anything.

Q In terms of your diagnosis of Mr. Williams, do you recall what your final diagnosis was?

A I don't think I gave him a psychiatric diagnosis in the report. There are a number of psychiatric diagnoses that could be applied.

Q Do you recall giving a diagnosis of unsocialized aggressive conduct disorder?

A That would certainly be, that would certainty fit.

Q Is that a diagnosis that is usually reserved for children as opposed to adults?

A It is usually used in children, but the diagnostic criteria for an antisocial personality disorder are so specific and so strict that one encounters people who have had a lot of trouble with the law that they don't fit the criteria for antisocial personality disorders.

It doesn't say – at least the last time I looked at the diagnostic manual – didn't specifically say that you couldn't use conduct [211] disorder for adults. But it is true that it is more often used for children.

Q Dr. Mansheim, just a couple more questions. In terms of the fetal alcohol syndrome, if you had had some evidence of Mr. Williams' mother drinking alcohol while she was carrying him, would you have consulted other experts in the field?

A Well as I said, I certainly would have consulted a standard text to find out what the agreed upon diagnostic criteria are. I don't know how much further than that I would have gone with it.

Q Are you aware that there are experts in the field that would have more expertise in fetal alcohol syndrome?

A Certainly.

Q Such as a geneticist?

A That would be one possibility or else the other thing would be to just look up in the literature and find

out who is writing all the papers and doing all the research and learn what university they are at.

Q What about a dysmorphologist?

A Dysmorphology, that is a relevant discipline.

Q Have you ever consulted a [212] dysmorphologist before?

A Not independently of a medical geneticist. There are a lot of people who do medical genetics are good at dysmorphology, so within that context, yes, I have consulted them.

Q Okay, you have contacted and consulted with geneticists?

A Yes, when I saw a patient that I thought had a dysmorphology or looked like they might have some sort of syndrome, yes.

Q And in terms of your discussions with Mr. Motley, you said you did talk to Mr. Motley before you testified?

A Yes.

Q Do you recall if you spoke with Mr. Smitherman before you testified?

A Yes.

Q Do you recall if you spoke with Mr. Smitherman before you testified?

A I don't remember.

Q Are you certain that when you spoke to them you did not give them any opinion on future dangerousness?

A No, I am not certain of that.

Q You are not certain of that?

A I am not certain of that.

Q But it is not reflected in your file or four notes; correct?

[213] A It is not reflected in my notes or in my report, and I assume it wasn't reflected in my testimony.

Q Sitting here today you don't recall giving them an opinion on that?

A No.

Q In fact, didn't you give an affidavit in this case one time at our request?

A I did.

Q And do you recall in that affidavit discussing whether or not you had been asked to look at future dangerousness?

A Yes, I think I said in the affidavit that I had not been asked to give any opinions about future dangerousness.

Q And you gave that affidavit in '88; correct?

A Yes, but even though it was only two years later, I have to tell you in all frankness that memory was still pretty cloudy even by then. Even in '88 I probably didn't remember a whole lot more than I remember now.

Q Do you think you would have remembered it least a little bit more in '88 than you do now?

A Probably, yes.

[214] Q And do you agree with your statement that you gave in '88 that if you were going to evaluate Mr. Williams on future dangerousness or continuing threat to society, you would have spent more time evaluating him, particularly on his history – medical, family, school, etcetera? Do you recall that?

A Yes, I recall that, and I still feel the same way. If someone had asked me to do a comprehensive evaluation on that, be prepared to go to court and testify and be cross-examined, I agree with what I said then, I certainly would look at lots of records, employment records, school records, all kinds of records.

Q So if you had said anything to Mr. Williams' attorneys about future dangerousness, it would have been without doing a full evaluation?

A That is true.

MR. MARTORANA: I have nothing further.

THE COURT: All right, Mr. Condon.

CROSS EXAMINATION

BY MR. CONDON:

Q Doctor, you found Mr. Williams competent to stand trial and not insane at the time of the [215] commission of the offenses; is that correct?

A Yes.

Q And whether you reviewed the Central State doctors' report which found the same thing, you have no disagreement with it?

A I don't have any disagreement with that conclusion, right.

Q I am a little confused. You said you diagnosed, you had a case of FAS before you examined Mr. Williams?

A Yes.

Q This is what confuses me, why would you have had to go review the literature if you had already had an FAS case?

A Right. What I said is, if I had seen some dysmorphology of the face that made me start thinking about fetal alcohol syndrome, and if I were going to come to court and testify about it, I would have boned up on it. I wouldn't want to come to court and be cross-examined and not know about it.

Q But you didn't mean that between the time you had been up on it and had diagnosed it prior to examining him that you had forgotten everything?

A No, not that I had forgotten anything, just that I had no piece of information about Mr. [216] Williams that would have led me to the diagnosis of fetal alcohol syndrome. And I think of facial dysmorphology as being the first thing you look for.

Q So you didn't see the cranio facial abnormalities that you had seen in the earlier case or that would have alerted you?

A That is right.

Q There is also another category, neurological abnormalities, you didn't find any of those, either, did you?

A No.

Q So there was nothing to alert you to FAS?

A Correct.

Q Do you have any idea when FAS became something that was common knowledge in your specific profession – not the medical profession, but your specific profession?

A No, that I don't.

Q Do you have any idea – it certainly was current, at least you were aware of it prior to Mr. Williams because you said you had diagnosed it?

A Yes, I had a case earlier than 1986.

Q Do you have any idea when it became common knowledge in the general medical profession or [217] in the field of obstetrics?

A I really don't.

Q Do you have any idea when it became common knowledge in the general public, laymen?

A No.

Q The second capital case that you had, is that the only other capital case that you have been involved in?

A In this sort of situation and in this court. I have been involved in lots of others but in different courts.

Q In the second case, you said you participated more fully?

A Right.

Q Did you testify in that case about lack of future dangerousness?

A I don't remember. I mean, I don't remember, but considering that I was involved in the discussion about whether the defendant was going to testify and a lot of other things that were kind of peripheral, I just can't believe that I wasn't asked questions about that.

Q In Mr. Williams' examination, you found what could be characterized as scant evidence of mitigation. In the other case that you handled and [218] that you participated in more fully, was there more in mitigation in that case?

A Right. Well the issue in that case or one of the issues was if the person were in a prison situation what my opinion was on the probability he would be dangerous.

Q So is it possible that one of the reasons you participated more fully in that case is because you had more to work with in that case vis a vis what you found after examining the patient?

A I had more information.

Q Well didn't you have more favorable diagnosis, didn't you have more in mitigation in that case?

A Well I am not sure I had a lot of information on Mr. Williams. In other words, I think it is possible there

might be a lot of information I didn't have. So I mean at the time that I testified, what I had was pretty small, a small amount.

Q And when you examined Mr. Williams, you were aware at least that he had been charged with a number of other offenses, not just a capital murder?

A Yes, I knew that.

Q Did you have any of the details of any of the other crimes?

[219] A Yes, I had the complaint report of Alberta Stroud and the report from the Memorial Hospital on Alberta Stroud.

Q Did you have any report on a man who had been stabbed, Mr. Solomon, had been stabbed and his house set on fire, an elderly man?

A Mr. Solomon?

Q Yes.

A I didn't list it in my list of things that I had when I did the report, so I can only assume that that means I didn't have it.

Q But in your report itself, you make note of the fact that he had prior felony convictions, '76 armed robbery and breaking and entering and grand larceny in '82? That is correct?

A Yes, I had all those things.

Q And you also knew something about his juvenile record, that he had been to reform school for stealing a bike, breaking windows, and other things?

A Yes, I knew that.

Q Now you are not sure whether or not you were asked about future dangerousness?

A Right.

Q Suppose you had been asked about future [220] dangerousness, based on the fact that this man has been to prison twice, and based on what knowledge you had from the reports regarding the capital murder, regarding the Mrs. Stroud, the facts surrounding Mrs. Stroud, and the other I believe there were a couple of grand larcenies, the reform school history, if you had that information, if you had been asked to give an opinion on future dangerousness, what would it have been?

MR. MARTORANA: Your Honor, I am going to object to that question. I think it is totally irrelevant to ask Dr. Mansheim what he sitting here today would have given as a diagnosis when he says he wasn't asked to do it and doesn't recall if he ever told anyone whether or not he had any opinion.

THE COURT: Isn't that the same thing you are doing to all these other things? You say if you had it, what would you say?

MR. MARTORANA: Your Honor, he said he didn't do a full work-up, he would have had more information and [221] would have done more on history. And, you know, what he is going to say today has absolutely no relevance as to what he would have told the attorneys back then or what he would have testified at trial if he had been asked.

THE COURT: I think it is probably important what he would have said then because I think that there are some things that were said. I think the question –

MR. CONDON: He may have said something.

MR. MARTORANA: Your Honor, that is not the way –

MR. CONDON: And I think we have laid a foundation for it through Mr. Motley and Mr. Smitherman.

MR. MARTORANA: Your Honor, I am not sure that that is what the question was. The question wasn't did you have an opinion back then, it is given this information today what he would you [sic] say.

[222] THE COURT: I think he is entitled to examine him along those lines.

Q I will ask it both ways, Doctor. Could you, based on that criminal history, do you have any doubt that you possibly could have said to the attorneys, even though you don't recollect the conversation, that if asked the question on the stand you would have to concede that he would be a danger in the future?

MR. MARTORANA: Your Honor, we would just like our objection noted for the record.

THE COURT: I will note your objection.

A Given the demographics that he was young and had a lot of difficulty with education, there is not a long-term career kind of situation, and that there was this string of violent crimes, I am sure if someone had said

what do you think would be the probability that Mr. Williams would commit another violent crime if he were out in the world, I am sure I would have said there was a high probability that he would commit another violent crime.

Q Is there any significance to the fact that in most if not all of these crimes, the victims [223] were elderly?

A Certainly.

Q Does that indicate anything in the way of future dangerousness or is that a factor to be considered that the preying is on elderly individuals?

A Well I am not sure that one can really go beyond the fact of extremely violent crimes. As I look at it, it is a big picture. And if a person has committed several violent crimes, that is one of the issues, not so much whether it is a preying situation.

MR. CONDON: Thank you, Doctor.

REDIRECT EXAMINATION

BY MR. MARTORANA:

Q Dr. Mansheim, you agree that you did not have all the information back in 1986, and you still do not have all the information today to give an opinion, reliable opinion, on future dangerousness in Mr. Williams' case. Do you agree to that?

A What I agree about is that I would hope that had I been asked to give a specific opinion about it that I would have gotten more information. I agree to that.

* * *

[226] mitigation if you had learned that Terry had had a difficult childhood where he was removed from the home and put in foster care for several years?

A I don't know that that would have been terribly relevant, no. That is a two-way sword. One can use that as an argument for non-mitigation, saying the person has had such a rotten life and doesn't trust anybody, why would he ever trust anybody again.

Or you can you say the person has had such a difficult life, why should his life be even more difficult by what goes on in court.

Q That is something that the attorney would have to make a decision on; correct?

A Yes.

Q Dr. Mansheim, just a couple more questions. In terms of the issue of future dangerousness and if you had been asked by Mr. Williams' attorneys to give an opinion, would it be correct that you would have spent a lot more time than an hour and a half with Mr. Williams to get more information in order to make that determination?

A I don't know if I would have spent more time with Mr. Williams, but I think I would have spent more effort on the background information.

[227] Q Would it be correct that You would have expected the attorneys to provide you with quite a bit more background on Mr. Williams?

A Yes.

MR. MARTORANA: I have no further questions.

RECROSS EXAMINATION

BY MR. CONDON:

Q Doctor, maybe I am confused, but aren't we confusing here in this latest discussion, things about background and home life, and things like that, isn't that more properly characterized as mitigation? How does that factor into future dangerousness? I mean, aren't we talking two different issues? If he goes to prison, gets out, commits another crime, goes to prison, then goes on a crime spree, sets a house on fire, stabs a man, beats an old woman into a vegetative state, commits a capital murder, don't you basically look at that when you are judging future dangerousness? How does his family background and home life, isn't that mitigation and not factors into future dangerousness?

A As I said, a bad home life is something that is on the RORSCHACH test. Somebody is going to look at it and say, this poor fellow had such a bad [228] home life you should be not so hard on him in court.

And somebody else is going to say, look at this fellow had a horrible home life, even his mother didn't love him, how are you going to expect him to be nice to citizens on the street.

Q But my point is, isn't that mitigation in the strict sense and not something that is relevant to whether he is going to be a danger in future?

A No, I think it is both. Just depends on how you look at it.

MR. CONDON: That is all.

THE COURT: Want to excuse the doctor?

MR. MARTORANA: Yes.

THE COURT: You may go.

* * *

[TESTIMONY OF DR. MILLER M. RYANS]

[231] A I just have my hospital – I have my whole file here, but I just have these where I could have ready access to them to answer the questions.

Q Like you to take a look at an exhibit which has been marked Petitioner 39 and see if you can identify that for us.

A All right.

Q Would you just take a moment to look through that if you could tell me if that is the file from Central State that has been kept on Terry Williams?

A Yes, this is the file for Mr. Williams, that is correct.

Q Do you recall today what tests were done on Mr. Williams while he was at Central State?

A Yes, I do.

Q Do you think you could quickly and briefly list them in terms of the various tests that were done?

A Yes, he was given sleep deprived electroencephalogram with nasopharyngeal lead. He was given a

neurological examination, he was given a skull film, he was evaluated psychologically by Dr. Centor and clinically by Dr. Centor and myself.

Q Let's take them one at that time. The [232] sleep deprived EEG with nasal – what was that other term?

A Nasopharyngeal lead.

Q What is that test, how is that test done?

A If the person is sleep deprived and also has these nasopharyngeal leads, the test becomes more sensitive to any type of brain damage as opposed to a routine – as opposed to a routine electroencephalogram without the sleep deprivation and nasopharyngeal lead. It is more sensitive.

Q Would that pick up a brain injury, that type of test?

A Yes, usually.

Q Usually but not always?

A Not always.

Q What about a brain tumor, would that pick up a brain tumor?

A Yes, it should be able to if there are any clinical ramifications like the person having severe headaches and dizzy spells or blackouts or seizures, it should be able to pick it up.

* * *

[237] it might have been if he had actually fallen asleep?

A All I can say is that is a possibility, but I can't say with medical certainty.

Q Do you know if you spoke with Mr. Williams' attorneys before you got involved with evaluating Mr. Williams?

A I don't believe I did. I don't recall speaking to them.

Q Do you know if you spoke with them before the day of the trial?

A I did not speak to them, no, I did not.

Q Going back to the tests that were done, the second one was the neurological examination. Can you tell us what that consisted of?

A Yes. We have a board certified neurologist, Dr. Sefthen, who performs these tests. What I do is make up the request, and then she carries out the neurological evaluation based on my request for consultation in the matter.

Q What type of tests did you do, do you know?

A Did Dr. Sefthen do?

Q Yes.

A Well she did a neurological test. I have her findings here. She went into – well I can [237] read it to you.

Q Maybe just briefly, just very quickly explain what the test consisted of.

A Well she does the test of pupils to see if they are equal and respond to light and accommodation. She does – yeah, it is in here. And she examines the fundus of the eyes. That is, the eye grounds, they can tell you quite a bit about any disease process or any increased intraocular pressure.

She does the reflexes. In this case she did the deep tendon reflexes, which includes the Babinski, and that tests his motor responses and his coordination.

And that is what her report says. I am just reading from the report. And her bottom line was normal neurological findings.

Q So those were the extent of the tests she did?

A That is correct; yes.

Q And the skull film, what does that consist of?

A It is just an x-ray of the skull that was done on August 7, 1986. Impression, normal skull.

* * *

[241] Q Can you tell from looking at your file what the social worker did in terms of his [242] responsibilities on the team?

A I have his report here. He filled out his social services initial assessment, and he just goes into the reason for admission, the health condition and housing situation prior to admission and income status.

That is all I have on what Mr. Lifsey, the social worker, did in this case. I don't know if he went beyond that.

Q Is there a date on that report?

A Yes, sir, July 29, 1986.

Q And what is the social worker's role on this team, can you tell us?

A He is supposed to collect background data if possible, and then if there is anything that we need to know, he is supposed to get it for us, if possible. I don't know back in '86, I have no idea what he collected other than this report here.

Q But you agree that report is fairly scant in terms of any information on it?

A Yes, I agree.

Q You have seen reports that have a lot more information, haven't you?

A Oh, yes.

Q And when you say background data, are [243] you talking about family life, medical history, social services?

A Yes. You know I have a little background, with my staffing I have a little background on this gentleman that I placed in there in regard to just in general what his background. You have my report there.

Q Before we get to that, just in terms of what the social worker is supposed to do. What type of background is the social worker supposed to look for?

A He is supposed to get a family background. If there is any background material available, he is supposed to check with the family, especially the parents,

wife if possible, children, whatever there is available, the social worker is supposed to get background information.

Q How does the social worker do that? Do you know?

A He is supposed to contact, he is supposed to talk to the patient and get names and addresses and phone numbers and try to make a connection to whatever the patient gives them.

Q Is there any indication that the social worker contacted Mr. Williams' family on his report?

[244] A There is no indication here. I am not sure whether or not it was, but there is no indication here that he did, because he is supposed to have a file background, social history, and I never found it in this case.

Q And then you mentioned that you had a report that had some background. Is there a date on that report?

A No. I just put down what he told me briefly about his past being at Hanover and Beaumont as a child and serving four years and eight year sentence for armed robbery which occurred in 1976.

He told me he hadn't previously been in a mental hospital or mental health clinic for psychiatric care. And to me he denied that he was using drugs or alcohol.

And I always ask the same question, whether or not they are suicidal for obvious reasons, and he denied being suicidal. That was the extent of my query into the gentleman's background.

Q And that report is dated July 30, 1986?

A That is correct.

Q And that is the one that has your name and Mr. Lifsey and Mr. Lee?

[245] A Yes, that is correct.

Q Now in 1986 were you familiar with fetal alcohol syndrome?

A Yes, I was familiar with fetal alcohol syndrome in 1986.

Q And when you say familiar, what were you familiar with in 1986?

A Well according to the fourth edition of the Comprehensive Textbook of Psychiatry, Kaplan and Sadica, there is an entry, it was '85. And it is delineated on Page 1022.

And they give the stigmata, the four stigmata of it. And that was available at that time. And clinically I was aware of children who had alcoholic mothers who drank while they carried them. And I saw firsthand the results of it.

Q And were you aware in 1986 that that was a significant condition that merited further evaluation and diagnosis?

A Yes, if the criteria were there it should be followed through. If you see the four criteria, then you have an obligation to carry through and see where it goes.

Q And is there information that if you had been provided you may have carried that further and [246] looked into it?

A Oh, yes. Part of that would be in the case, one of the criteria is low birth weight and the length of the baby, is it shorter than normal.

And there is nonspecific major or minor malfunctions of the joints. These kids are crippled, more or less, and they have central nervous system dysfunction in regard to memory and cognitive disturbances of speech and failure and motor activity and unable to recognize objects and disturbance in their executive functions, such as organizing, planning, sequencing and abstractions.

Those are the things that you would try to check out and see whether or not there was an existence at that time.

Q Is it your understanding that all those criteria have to be present or just some of them?

A Not really. I think the key is the history of the mother drinking while she is carrying the child, because alcohol crosses the placenta membrane into the brain of the baby and has a toxic or poison effect on the brain affecting the cognitive functions, the memory, the joints, even distinctive facial features of these children.

So it is quite obvious in these [247] cases. But it is all matter of degree as to how much alcohol passes the placenta membrane as to how much the baby will be affected.

Q If you had been given information that Mr. Williams' mother had drank quite heavily while he was being carried in utero, would that have led you to red flag that and do more evaluation?

A Yes. The first red flag, I would be certain to make sure that Dr. Sefthen, the neurologist, be aware of that.

And I am quite sure if she had that information, that would direct her, she would focus more in that direction. And I am quite sure that she would have ordered a brain scan to go with her workup, to delineate the situation. I am sure she would have minimally.

Q Anything else other than giving that information to Dr. Sefthen?

A Well, as I said, you know, we would go with the criteria, especially with the central nervous system dysfunctions that I just mentioned, any type of language disturbance, any type of motor activity that is impaired, his inability to identify objects, maybe pick up a pen, and the person is unable to say this is a pen or this is a ring, or [248] this is a wrist watch, that type of thing.

And they are unable to plan, organize, sequence, abstract. They are not concrete in their thinking, they can't think in an abstract manner. You have to check those out, there are tests that you can take.

Or you can even go into a more sophisticated psychological testing, Halstead-Reitan business, which would be more definitive if you suspect it.

But you have to have the suspicion, you have to have guidance of someone saying well this man's mother was drinking while she carried him. I never got that.

Q You would agree that you are not normally going to get that from the patient, him or herself?

A That is correct.

Q How would you normally get that information in this type of case? Would you normally get it through the attorneys?

A Well the attorneys are supposed to supply us with the background material, the significant background material.

Between the attorney and the [249] social worker, they are the ones that we rely on heavily to give us any information that we can't get ourselves.

You see, information that I received, I got it from Mr. Williams directly. But these things about his background, his birth, and his mother drinking, that would have to come from other sources, either from the attorney or the social worker. In this case we never got that.

Q Like to show you a couple of exhibits, Dr. Ryans.

A Sure.

Q Let me start with Exhibit 8; I think you have a different book over there. Exhibit 8, it is quite a few pages, let me see if I can direct you to a particular page in that exhibit?

Well I didn't count the number of pages in, but it is called a prehearing investigation, Danville Juvenile Court, maybe about ten pages into the exhibit.

A Danville Juvenile Court.

Q That is it. If you will take a look at the first page, that is the one –

MR. MARTORANA: Judge for your help in finding it, it is –

[250] THE COURT: Is it the prehearing investigation?

Q Yes.

A I have it.

Q And you will see the birth date down there of Mr. Williams, September 11, 1955?

A Yes, I see that.

Q If you look at the first and second paragraphs of that, and there is some indication that the children, several of the children of Mr. and Mrs. Williams had been drinking?

A Yes.

Q And were intoxicated, and that Mr. and Mrs. Williams themselves were intoxicated?

A Yes, I see that.

Q Is this the type of information that if you had had that would have led you to look further into possible fetal alcohol syndrome?

A Certainly.

Q And you have still got Volume 3 over there; correct?

A Yes, sir, Volume 3, yes, sir.

Q If you will turn to Exhibit 38?

A 38, okay I have it.

Q And Exhibit 38 is an arrest record of [251] Lula Snipes Williams, who I will tell you is Mr. Williams' mother?

A Yes, I have it.

Q If you go to the second page?

A Yes.

Q There is an indication she was arrested for possession of illegal whiskey?

A Yes, I am looking at it.

Q And if you will turn to the next two pages, again Lulas Snipes Williams, there is indication on neglect of infant child?

A Yes, I have it.

Q Are these the types of records that would have led you to look further into possible fetal alcohol syndrome?

A Certainly.

* * *

[254] Q Let me see if I understand. You talked about the fact that mitigation can also be separate from future dangerousness, but now you are going back to future dangerousness?

Let me just see if I can clarify this. Do you do an evaluation of mitigating circumstances, whether or not they factor into future dangerousness, but mitigating circumstances that might be able to be used at trial?

A Yes.

Q Is there a report that goes through any mitigating circumstances that were found by the team that evaluated Mr. Williams?

A I don't quite understand what you are saying. You have Dr. Centor's report that initially said low probability. Is that what you are referring to?

Q That is one report that I did want to talk about. But is there any report that says, Here are some mitigating circumstances that we found that we think you should know about?

A No, I don't think the report had anything of that nature in it.

Q Is that something that you would do? Is [255] that your role to find mitigating circumstances and list them in your report?

A Yes, the best we can, when they are available.

Q And because they are not listed in your report, would it be correct to say that they were not available in this case?

A That is correct.

Q And how do you learn about mitigating circumstances?

A Through the investigatory material which is furnished by the attorney and the social worker.

Q And by the attorney, would that be the defendant's attorney?

A That is correct.

Q So you expect the defendant's attorney to provide you with quite a bit of material?

A Yes.

Q And you have done these cases before where defense counsel provide you with material?

A Oh, yes.

Q And did you have any material in this case from the defense attorneys?

A In retrospect, looking back, hindsight, I don't think that we had a whole lot of background [256] material in this case.

Q Did you have any background material from Mr. Williams' attorneys?

A I am not aware that we did.

Q Now you drew an opinion or Dr. Centor did in his report and you agreed that there was a low probability of a continuing threat to society; correct?

A Yes, initially.

Q And did you at some point change that opinion?

A That is correct.

* * *

Q If you would take a look at this document that has been marked 48, documents, they are three reports, one dated August 11, 1986 from Dr. Centor to E. L. Motley?

[257] A Yes.

Q One dated June 27, 1986 from Dr. Centor to Mr. Motley?

A Yes.

Q And another one dated September 10, 1986 from Dr. Centor to Mr. Motley?

A Yes, I have it.

Q Another one dated September 10 from Dr. Centor to Judge Ingram. If you will look at the first one to Mr. Motley?

A Yes.

Q In the last paragraph, this is your initial determination of low probability of future danger; correct?

A Yes.

Q And it says there are no mitigating factors for your client. Is that what you were just testifying about that you didn't have any information on mitigating factors?

A That is correct, yes.

Q When Dr. Centor sent this letter to Mr. Motley, do you know if Mr. Motley responded with providing you with any mitigating factors?

A I am not aware that there was any mitigating factors submitted.

[258] Q And it goes on to say that his psychological makeup is such that there is a low probability that he would commit criminal acts of violence?

A Yes.

Q I missed a few words. It says that his psychological makeup is such that there is a low probability that he would commit criminal acts of violence. What was his psychological makeup that is being referred to in this letter?

A That was the overall clinical evaluation. We go back and determine previous acts of violence, if there are any. And if there are not any that we are aware of, then we offer the opinion that there is a low probability of future dangerousness based on the material that we have at that point in time, which shows that the person basically, other than the act for which he was charged with at that time, was basically not the violent type.

Q Now this doesn't say that it is based on his past conduct or past criminal conduct, it says his psychological makeup?

A Yes.

Q Is there a difference between his past [259] criminal conduct and the psychological makeup?

A Usually they are related. However in this gentleman's case, and Dr. Centor did the psychological evaluation, and in the opinion of Dr. Centor, and he explained to me why based on his testing there was a low probability of future dangerousness because of the findings of his psychological testing.

Q And the psychological testing were the testing that Dr. Centor did?

A That is correct.

Q And what testing did Dr. Centor do?

A He did the RORSCHACH or the inkblots, he did the Bender-Gestalt, which takes organicity. He did the WAIS, the Wexler Adult Intelligence Survey.

And there is a list of the others, but those are the three main tests which Dr. Centor performed on this gentleman. And I think he did it on more than one occasion, so he was quite satisfied with the findings.

Q So is it your understanding of this report which you agreed to of Dr. Centor, that the psychological makeup that he is referring to basically comes from running these three tests?

A That is correct, yes.

[260] Q Now there came a time where you testified at the penalty phase of the capital murder trial for Mr. Williams; correct?

A Yes.

Q And at that time you were asked I believe by the Commonwealth whether you believed there was a probability of Mr. Williams being a continuing serious threat to society?

A That is correct.

Q And at that time you testified there was; do you recall that?

A Yes. From the time that we formulated the opinion, we became aware of information that was not available at that time which made us aware of an act of

violence which was perpetrated by Mr. Williams, which threw a different light on our findings.

Q Well would you agree that when you became aware of that, the psychological makeup had not changed?

A No, the psychological makeup had not changed.

Q And the testing that you ran to determine that psychological makeup had not changed?

A That is correct, had not changed.

[261] Q Now the Commonwealth called you. Do you recall speaking with Mr. Fuller and telling him that you had changed your opinion and you did believe that there was a future danger, that Mr. Williams was a future danger?

A No, what happened was, we were, as I said, after we formulated the letter based on the psychological testing, then we became aware of some information that was not available to us at the time, which I explained, and which threw a different light on the concept of future dangerousness based on the information that we were supplied after we had initially given a low probability estimate.

Q Do you know who supplied you with that information?

A I cannot recall. The only person I believe that would make us aware of any other information most likely would be either Mr. Fuller or a member of his staff.

Q And did you know that Mr. Fuller was going to call you to ask you your opinion on this matter?

A You mean as part of the testimony?

Q As part of the testimony?

A Yes.

[262] Q In the sentencing?

A Yes, sure.

Q So you had a discussion with him before you took the stand in terms of what your opinion was in this matter?

A Yes.

Q And did you tell him that you had changed your opinion from low probability to a high probability?

A Yes, based on the information that we received after, as I said, about an act of violence that was carried out.

Q Do you recall when you had this discussion with Mr. Fuller? Was it before you got to the courthouse the day of the trial?

A I don't think it was before I came to the courthouse. My recollection, but I can't be certain, but I believe that it was after coming to the courthouse. I may be mistaken, but that is my recollection.

Q But before testifying; correct?

A Yes.

Q Do you know if you had a discussion with Mr. Motley or Mr. Smitherman regarding your change of opinion?

[263] A I don't recall having a talk with Mr. Motley.

Q You don't recall whether you did or didn't, or you don't recall having it?

A I don't believe I did.

Q You already testified as to competency at the time of confession. Do you recall that?

A Yes.

Q And is that, for you to make a determination of competency at the time of confession, is that different than competency either at the time – competency to stand trial?

A Yes.

Q And is it different than insanity at the time of the offense?

A Two different things we are talking about.

Q Did you know when you were evaluating Mr. Williams that you were going to be asked to comment on his competency to give a statement?

A To give a statement at his confession?

Q Right.

A Yes.

Q And who told you that you were going to be called upon to do that?

* * *

[265] Q Well did you evaluate Mr. Williams for competency at the time of the confession?

A Yes. Well the investigatory material that was provided for us, we go over it very carefully and talk about it. And we ask ourselves these questions, whether or not at the time the person made the statement, whether or not they were incompetent or whether or not they were psychotic or whether or not there was evidence that the person was out of touch with realty or was not able to understand what he or she was saying at that point in time. Then we conclude after reading the statement, we come to a conclusion.

Q You have testified before in sentencing phases at capital murder trials other than the Terry Williams case, haven't you?

A Oh, yes.

Q Do you know how many cases you have testified in?

A I would say a minimum of maybe – this is a ball park figure, at least a dozen.

Q Have you been called upon in those cases to testify about whether or not you believe the defendant is a future danger?

[266] A Yes, we have to give that opinion.

Q Have you ever been asked whether a defendant would be a future danger in a structured setting such as prison?

A Yes, I have been asked that, yes, I have.

Q You weren't asked that in this case, were you?

A I don't believe I was.

Q Do you know if you had an opinion as to whether or not he would be a future danger in prison?

A In my opinion of Mr. Williams, if he were incarcerated, in my opinion I don't see where he would be dangerous in the future if he were incarcerated.

* * *

[CROSS EXAMINATION]

[269] Q But isn't it – and I have tried to clarify this once before today – isn't if somebody had alcoholic parents or problems in the home, isn't that more mitigation, evidence of mitigation and not relevant to whether or not he is going to be a threat in the future?

A That would be more mitigation, yes.

Q Isn't what is relevant to future dangerousness his criminal background, isn't it?

A That is what we focus on.

Q Isn't that the primary thing?

A Yes.

Q So background, when we say background, it would mean the mother was an alcoholic or the father beat him or the father left home or something like that, that is more in the line of mitigation, not future dangerousness?

A Yes, that would be more mitigation.

Q They showed you or they referred you to a warrant in March, '56 where the petitioner's mother was convicted of possession of illegal whiskey.

Since the petitioner – and you said that that was relevant. Since the petitioner [270] was born in 1955, how would that be relevant?

A This happened in '56?

Q The warrant is 1956, March, '56?

A He was born in '55?

Q Yeah. How would that be relevant? I was confused on that. In regard to FAS, how would that in any way be relevant?

A No, it was just, shows he comes from an unstable family background. That is all we were saying.

Q But I think you said it might have been important in alerting you to looking for FAS.

A Yes, that is a possibility if his mother was involved in alcohol, but I would have to have proof that she was while she was carrying him was drinking.

Q If the warrant had been before he was born, that would have made sense, wouldn't it?

A But it was after he was born, yes.

Q Do you consider yourself an expert on FAS?

A I am not an expert on it, but I am aware of it. Clinically I know of it.

Q In your field, you are qualified to speak to it?

[271] A Yes, certainly.

Q Aren't there certain characteristics that you look for?

A Yes, as I think I already pointed out.

Q Yeah, I wanted to ask you about that. Isn't there one category called craniofacial abnormalities?

A Yes, they are called cluster facial abnormalities. Yes, that would be one.

Q And another one neurological abnormalities?

A Yeah, neurological – there are central nervous system dysfunction, neurological abnormalities.

Q Now did you find any craniofacial abnormalities?

A I found no craniofacial abnormalities. As I said, the one thing I found was his right eye, his strabismus is averted outward that I noticed. That was the only thing I noticed unusual.

Q Do you know from your own knowledge whether that is one of the criteria listed under craniofacial abnormalities?

A No, we are talking about nasal labial folds altered to where it is noticeable, not the [272] usual facial appearance.

Q So the answer is what you saw was not one of the criteria under the craniofacial abnormalities?

A That is correct.

Q Neurological abnormalities, I believe you have used the word organicity in past conversation?

A Yes.

Q If we are looking for neurological abnormalities, did you find any of those that would have led you to think that he had FAS?

A No. As I said, the tests we ran and then also clinically we didn't see any things like malformation of joints and cluster facial abnormalities.

We didn't have his birth weight or his length, which would be below normal. And central nervous system dysfunction, they mention specifically memory impairment and cognitive disturbance. That is language disturbances, impaired motor activities, unable to recognize objects, disturbance in executive function, that is, they are unable to plan, organize, sequence, or abstract.

We didn't find any of those [273] things that we were aware of at that time that came to us.

Q Well except for the birth weight, wouldn't your testing have found that other stuff, everything else you listed?

A Yes, if it were really significant it would turn up in the neurologicals of Dr. Sefthen's, the neurological examinations, the electroencephalogram or the skull film or in Dr. Centor's testing.

Q So is the bottom line then, nothing showed up?

A That is correct.

Q So can you state within a reasonable degree of medical certainty that in your opinion he does not have full-blown fetal alcohol syndrome?

A That would be my opinion.

Q Okay. And would that have been your opinion in 1986?

A Yes.

MR. CONDON: No further questions.

* * *

[TESTIMONY OF DEBRA GRANT]

[279] **DIRECT EXAMINATION**

BY MR. POWERS:

Q Mrs. Grant, I represent Terry Williams in this proceeding. I am just going to ask you a couple of questions, and I would ask you to speak up because your voice is being transcribed by the court reporter, and it will help her. Okay?

A Okay.

Q Could you please state your address?

A 135 Chatelene Avenue.

Q And did you live in the vicinity of Henry Street for a period of time?

A Yes, I did.

How many years did you live on Henry Street?

A About fourteen.

Q In what proximity were you to Mr. Stone, the decedent? Where was your house and where was his house?

A Across the street.

Did you know Mr. Stone?

A Uh-huh.

Q And he was also known as Schooner?

[280] A Uh-huh.

Q Did you know him well?

A Yes, I did.

Q Was he a friend of yours?

A Yes, he was.

Q Did you also know Mr. Williams?

A Yes, I did.

Q Was he a friend of yours?

A Yes, he was.

Q Now you testified at the trial in 1986, didn't you?

A Yes, I did.

Q And you were called by the attorneys for Mr. Williams?

A Yes, I was.

Q Were you contacted by those attorneys before you testified, before the day that you testified?

A No, I wasn't.

Q How did it come about that you testified that day?

A I was here at the trial, and at the last minute they asked me to come up and speak on the part of how he was friendly.

Q About how -

[281] A Mr. Williams was.

Q Was friendly?

A Uh-huh.

Q And had you approached the lawyers for Mr. Williams and said that you had some information that could be relevant to this case that day?

A No, I didn't.

Q Did Mr. Stone drink a lot?

A Yes, he did.

Q And when he drank, did he often drink to excess? In other words, did he drink to the point that he was drunk?

A Yes, he was.

Q And when he got drunk, what would happen to him?

A He would pass out.

Q Was this a regular occurrence?

A Practically every day.

Q Did he ever, did you ever witness any times where Mr. Stone fell?

A Yeah, he fell down the steps once.

Q And when did that happen in relationship to his death?

A I say about a week or two before his death.

* * *

[TESTIMONY OF DR. ARTHUR CENTOR]

[296] Q That is Exhibit 48, you may hold onto those. Do you recall whether or not you ever spoke to Mr. Motley or Mr. Smitherman prior to evaluating Mr. Williams? And maybe I should back up and ask you do you know who Mr. Motley and Mr. Smitherman are?

A I know – I met Mr. Smitherman today. I do not recall having ever spoken to him. I knew Mr. Motley from before, but I can't tell you whether I did talk with him or not. Probably had a few words with him.

Q Would your file, would the Central State's file reflect if Mr. Motley had communicated with you and sent you information?

A It wouldn't reflect that.

Q Well if he had sent you a letter, would that be kept in your files?

A It might be in the hospital file, but it wouldn't be in my report.

Q Let me show you Exhibit 39 which I believe are the hospital files and see if you recognize those.

A These are Central State's.

Q The Commonwealth and defendant have stipulated that these are documents received from Central State, and I just, if you could briefly [297] look through that?

A Why don't you help me. Are there any reports from Mr. Motley?

Q I didn't see any letter in here. I guess my question is, would it have been kept in the files?

A It would have been kept in these files.

* * *

[298] Q Do you recall ever meeting with Mr. Motley before the trial?

A I have no recollection whether I did or did not.

* * *

[305] Q What about the capital murder case, do you recall speaking to Mr. Fuller before trial?

A I don't remember it, but I am reasonably sure that I did.

Q Why are you reasonably sure you did?

A Because that is usual procedure.

Q Now in your August 11 letter to Mr. Motley, let you see that again, I have it right here, Exhibit 48, if you look at the last paragraph on the first page, starting from the third sentence:

It is therefore our opinion that though there are no mitigating factors for your client, that the psychological makeup is such that there is a low probability that he would commit criminal acts of violence that could constitute a continuing serious threat to society.

A That is correct.

Q Do you recall giving that opinion?

A After refreshing my memory by reading this report, yes.

Q Was that just today or did you read it at some earlier date?

A This was part of the material that was sent to me.

[306] Q So you read it a few days ago?

A That is correct.

Q Do you recall your testimony at trial with regard to the issue of future dangerousness?

A Which trial are we talking about?

Q I am talking about the capital murder case?

A The issue of future dangerousness?

Q Yes.

A I am sure I did.

Q Do you recall it?

A Not exactly.

Q Do you recall that your opinion during the trial was different than your opinion here in this letter of August 11, 1986?

A Yes.

Q And you recall that you found that there was a high probability of a continuing threat to society; correct?

A That is correct.

Q Now in terms of your opinion that you gave at trial, do you recall if you told Mr. Fuller that you had changed your opinion before you got up to testify?

A Yes.

[307] Q And you did tell him that?

A I am reasonably sure that I did, without being certain.

Q Do you recall if you told Mr. Motley or Mr. Smitherman that you had changed your opinion?

A I have no recollection of that. I have no recollection of whether I did or did not.

Q Do you recall speaking to Mr. Motley before trial?

A Have no recollection of that.

Q You seem to have a clear recollection that you talked to Mr. Fuller; is that correct?

A I have a recollection. I don't know how clear it is, but I do have a recollection of it.

Q Do you recall that the Commonwealth called you as a witness?

A That is correct.

Q And since you changed your opinion, would you say that you – and the Commonwealth called you on that issue – that it is likely that you did tell Mr. Fuller that you had changed your opinion?

A That is correct.

Q Now in terms of your finding of low probability of future dangerousness?

A Yes.

[308] Q This report indicates that there are no mitigating factors but that his psychological makeup is such that there is a low probability that he would commit criminal acts of violence. Do you see that?

A Yes.

Q And what test did you do or what did you do to determine what Mr. Williams' psychological makeup is?

A This is, the RORSCHACH, and I see here was a repeat RORSCHACH, RORSCHACH being the inkblots test. But this in combination with the materials available to us at the hospital at the time of his behavior while incarcerated and while not incarcerated.

Q Well it talks about a psychological makeup, and you are saying part of a psychological makeup is information you have on his incarceration?

A Period of incarceration, right, and any reports from probation officers.

Q Do you have a recollection of Mr. Williams, history of incarceration and how that would factor into the low probability that you first stated in your report of August 11?

A In going through the hospital records that I glanced through previously, there were reports [309] in there of previous incarcerations and other reports, social work reports, of his behavior before and after incarceration.

Q And do you recall –

A I don't recall exactly, no, but I know that they were there.

Q And in terms of your final – not your final opinion, but your opinion on August 11, do you generally recall what those records show about his incarceration?

A That he was nonaggressive, he was not dangerous, not violent.

Q You have testified at a number of capital murder trials, haven't you?

A That is correct.

Q Do you know how many you have testified at?

A At this moment, no. I used to keep a record, but there are about twelve, something on that order.

Q I jumped right into this and I didn't ask you some preliminaries. Let me just back up for a minute. Are you still working for the state today?

A No. Let me just add, I am not licensed in the state anymore. I am in Minneapolis, and I let [310] my Virginia license lapse.

Q And are you now practicing in another state?

A No, I am completely retired.

Q When did you retire?

A When did I retire? I retired from the state in 1988 and then did private work for the courts and for the private sector until the last one I believe may have been in January of 1994.

Q Now in terms of your testimony at other capital murder cases, have you testified on future dangerousness in other trials?

A Yes.

Q Would you say you testified in all those twelve that you indicated?

A Well, if I testified in a capital murder case, yes, I testified about future dangerousness generally.

Q And have you been asked at some of those trials whether or not the defendant would be a future danger in a structured setting such as a prison or correctional facility?

A In many of them, yes.

Q And were you asked that at the Terry Williams trial?

[311] A I don't believe I was.

Q Do you recall if Mr. Motley asked you not on the stand but asked you at any time whether or not Mr. Williams would be a future danger set in a structured setting?

A I have no recollection of it.

Q Do you know if you would have had an opinion back in 1986 if you had been asked that on the stand whether or not Mr. Williams would be a future danger in a structured setting such as a correctional facility?

A I would have had an opinion if I had been asked.

Q What would your opinion have been?

A My opinion would have been, and I would have so stated that in a structured environment he would not be of future danger, he would not be hostile or violent or commit crimes, not likely to commit such acts of violence that he would be a danger to that society in a structured environment. And that would include other inmates and administrative personnel and guards.

Q In terms of that opinion, is that generally the opinion you would give, that you have given when you have been asked that at other cases?

[312] A No.

Q What has been the opinion you have given when asked that in other cases?

A That such individuals would also be a danger to society in a structured environment.

Q So would you say that Mr. Williams was somewhat unique in that he would not have been a danger in a structured environment?

A He would not likely have been a danger; you would have a low probability.

Q Low probability. Would you say that is somewhat unique?

A That would be somewhat unique, quite unique. Let me say quite unique.

Q Okay, thank you. Do you recall, let me ask you this, normally in your evaluations do you ever review the background of an individual in terms of – I know you have said you look at incarceration, would you also look at schooling, medical, family life, things of that sort?

A On reports of those. That is, usually the social service worker will gather those bits of information, they become part of the record, and those are reviewed.

Q And why do you review those, how do you [313] use that in your analysis?

A As some indicator of the individual's past history, which is one of the better indicators for future behavior.

Q Now you said you did have some indication in terms of past records and incarceration?

A That is correct.

Q Do you recall if you had any information in terms of any other past history of Mr. Williams?

A Not that I can recall, but there probably was or very likely there was enough information to come to the conclusion that there was a low probability that he would commit criminal acts of violence.

That is, this opinion was not based solely on psychological testing and interview. It was based both on the psychological tests and the material available to us of past behavior.

Q Incidentally, when you were appointed, did you consider yourself as appointed for one side or the other, the defendant or the Commonwealth?

A No, there is no such appointment.

Q You were appointed as a neutral, would you say?

[314] A That is correct.

* * *

A That is correct.

Q And did you feel free to discuss your findings with either Mr. Motley or Mr. Fuller?

A That is correct. As a matter of fact, separate report. I do believe, and I believe your associate Ms. Tarlow indicated to me that in July of 1986 the law, the statutes changed so that a separate report would go to the defense containing information that did not to go [sic] the Court or the Commonwealth attorney. And this report reflects that.

Q This report meaning the August –

A A separate one to Mr. Motley.

Q But you did state that you did speak to Mr. Fuller about the probability of future dangerousness before trial?

A No, not at this time.

Q But at what time – before trial; correct?

A No – well before trial but after a conviction on – I am pretty sure that was so the case, of an assault and battery or on an individual in Danville, a trial which took place I seem to remember a very short time before the capital murder case when I was apprised of his conviction.

And that became a matter of fact rather than an allegation. Once it was adjudicated, [315] then the opinion changed.

Q And you communicated that with Mr. Fuller?

A When he notified me that he was indeed convicted of that charge.

Q Mr. Fuller notified you of that and asked you, does this change your opinion?

A I believe that is what happened.

Q And at that time as best as you can recall you told him, yes, it does change your opinion?

A Yes.

CROSS EXAMINATION

BY MR. CONDON:

Q Dr. Centor, I will be very brief. Are you familiar with the condition fetal alcohol syndrome?

A Only since I read about it in this material and very little since then.

Q Well back in 1986 when you did this examination, did you know anything about it?

A No, sir.

Q If I told you that one of the criteria, one of the recognized criteria is neurologic abnormalities, did you find any neurologic abnormalities in Mr. Williams?

A None in the test material that I gave him, and I did give him apart from the Wexler Adult Intelligence Scale Revised and the RORSCHACH and Bender-Gestalt test for organicity or brain damage affecting intellectual functioning, I found no signs in those tests.

He was also given a neurological exam by a neurologist, and that report came back. There were no neurological abnormalities.

* * *

[TESTIMONY OF LULA WILLIAMS]

DIRECT EXAMINATION

BY MS. TARLOW:

Q Mrs. Wiiliams, can you state your name please for the record?

A My name Lula Williams.

Q And what is your address?

[329] A 202 Henry Street.

Q And are you employed?

A Dibrell Brothers, seasonal work.

Q How old are you, Mrs. Williams?

A Seventy years old.

Q How far did you go in school?

A 3rd grade.

Q Did you say 3rd grade?

A 3rd going into the 4th, but I didn't make it.

Q What is your relationship to Terry Williams?

A My son.

Q How old were you when you had your first baby, Mrs. Williams?

A 15.

Q And how many children have you had altogether?

A Fourteen.

Q Do you remember back to when you were pregnant with Terry?

A Sure.

Q Did you drink alcohol when you were pregnant with Terry?

A Right.

[330] Q And what kind of alcohol did you drink?

A Bootleg liquor.

Q Bootleg liquor?

A Right.

Q Where did you get the bootleg that you drank?

A My husband, he was selling whiskey.

Q Who was selling whiskey?

A Noah, my husband.

Q Who is Noah?

A My husband.

Q So you always had a lot of bootleg around the house?

A At the time.

Q You did. And how often did you drink when you were pregnant with Terry?

A Oh, we started like on Friday night and drank up until Wednesday or something like that, and then Friday night we start back again.

Q Would you start in the morning or what time of day would you start drinking?

A Start at night and drink from the morning, too.

Q So you drank pretty much all the time during those days?

[331] A Right.

Q Did you know back then when you were pregnant with Terry that drinking alcohol would hurt your baby?

A No, I didn't. At the time I didn't hear anyone say anything about drinking, smoking carrying kids.

Q Were you ever arrested for selling bootleg?

A Right, yeah.

Q Okay, let's talk some more about when you were pregnant with Terry. Did you ever go to see a nurse or a doctor when you were pregnant?

A No, I haven't heard anybody say anything about going to see no doctors or nurses like it does now.

Q Do you remember when you gave birth to Terry?

A Sure, yeah.

Q Was he born in a hospital?

A Born at home at the house.

Q Was there a doctor there to help you?

A Nobody but midwife.

Q You had a midwife. How much did Terry weigh when he was born?

[332] A Four pounds.

Q Do you still drink, Mrs. Williams?

A No.

Q And how long have you been sober?

A Haven't drank anything since early part in the '70's.

Q I want to talk now about when Terry was a baby. Did he live with you when he was a baby?

A Right.

Q And he was with you for about a year?

A Right.

Q And then what happened?

A Then the police, Miss Allen, Noah called Miss Allen over there and told her – we called him Baby – O'Harold was sick or something. And she found out that he had gave him some whiskey.

And then the cops come there and arrested him and me and they taken the kids. But Callie said that if I hadn't been taking the whiskey on myself every time he come there, he wouldn't have took me.

That is what Miss Allen was telling me when I was in jail. Miss Allen was the matron down there. She said that.

Q So the kids were taken away because you [333] and Noah were drunk and because they were neglected; is that right?

A Say I was drunk, but I wasn't drunk. He was

Q When Terry was born, did you breast feed him?

A Right.

Q And how did he do nursing?

A He nursed some and feed him with the bottle some.

Q Did he nurse well or did he have a hard time?

A He had a little hard time.

Q Why did he have a hard time?

A I don't know. Then I give him his bottle.

Q Did he cry more than the other babies that you had?

A He did.

Q Did he go to school like he was supposed to when he was a little boy?

A He went sometime and played hooky and play around with the other kids.

Q What would happen when Noah found out he played hooky?

[334] A He whipped him with a belt, tie him to the bed and whip him real bad.

Q Let's talk about Terry's father Noah, now. What kind of father was Noah?

A He was, you know, beat the children real often, you know awful, tied them up against the bed.

Q Who did he tie to the bed?

A The boys, whip them with a belt, sometime with a switch, put them between his legs and whip them, you know.

Q Did he tie Terry to the bed?

A Sure.

Q What did the other kids do when Terry was getting beat?

A They would stay back in the other room, something like that. He would beat them too if they watch see what he was doing.

Q Did Noah ever beat you?

A We had fights a lot of time.

Q Did he ever hurt you when you were pregnant?

A Well he hurt me, you know, but I didn't do anything about it. He knocked me down the steps one time when I was pregnant.

Q He did what?

[335] A He knocked me down the steps one time. He run away. When he came back he said he thought he had killed me.

Q Was Terry scared of his father?

A Sure; all of them was scared of him.

Q Okay, let's talk about what is going on right now with Terry, the problem he is having now. Do you remember when Terry was in jail and was charged with murder?

A Sure.

Q And did his lawyer, Mr. Motley, call you?

A He called me, talked to me.

Q Did he come over to your house?

A No, ma'am, no.

Q Where did you meet him?

A Here in a room.

Q Here at the courthouse?

A Right.

Q Was it just the two of you meeting?

A No, I think it was one or two of the children, I think, but I don't know if it was O'Harold or Albert.

Q Was there another lawyer there?

A It was two of them.

[336] Q Two lawyers?

A Right.

Q Did you ever talk to Mr. Motley on the telephone?

A I guess it was Motley or the other one, one of the two.

Q You don't remember which one?

A No.

Q Did Mr. Motley tell you that he wanted you to testify in court at Terry's trial?

A Right.

Q Did he tell you what kind of questions he was going to ask you?

A All he said he wanted to ask some questions trying to save his life.

Q Did he discuss the questions with you?

A He discussed some, but he didn't – I don't think he discussed everything like he should have did.

Q Did Mr. Motley tell you that Mr. Fuller would be asking you questions?

A Unh-unh, he didn't tell me that.

Q Did Mr. Motley ever ask you if you drank alcohol while you were pregnant with Terry?

A No.

[337] Q Did Mr. Motley ever ask you anything about your pregnancy with Terry?

A No.

Q Did Mr. Motley ask you anything about when Terry was born or if he had any problems or anything?

A No.

Q Did Mr. Motley ever ask you anything about Terry's father Noah?

A No, I don't think he did.

Q Did he ever ask you anything about Terry's childhood at all?

A No.

Q Did Mr. Motley ever ask you if you thought there was something wrong with Terry?

A I don't know whether he did. He could have; I don't know.

Q Do you think he should have?

A Sure.

Q Did Mr. Motley tell you that he thought Terry had mental problems?

A No, but I told him that.

Q You did tell him that?

A Right.

MS. TARLOW: I have no further [338] questions.

CROSS EXAMINATION

BY MR. DANIEL:

Q Mrs. Williams, how long did you meet with Mr. Motley?

A He called me on the phone, then when I met him it was down here. I don't know how long it was. It was in a room back there.

Q Well, do you have any recollection? Was it two minutes or an hour?

A Well it was longer than two minutes.

Q It was?

A Right.

Q Did he cut you off or did you have a chance to tell him whatever you wanted to tell him?

A No, he didn't cut me off.

Q Did you have a chance to tell him whatever you wanted to tell him about Terry?

A Whatever he asked me, I told him.

Q Did he ask you any general questions about – like is there anything that you can think of that might help Terry?

A Yeah, he asked me that.

Q Did you have a chance to answer those?

A Sure.

[339] Q What did you tell him?

A I don't know now what I told him.

Q So you don't remember what you told him?

A No.

Q Is it possible he asked you some questions that you don't remember now, since it was ten years ago?

A Well if I could hear it, maybe I would know.

Q And you testified at trial; right?

A Right.

Q You testified that he was a nice boy; right?

A Yeah.

Q So you just remember the two times you had any contact with his lawyer, the once on the phone and once in the office down here, once in the room down here?

A I think he called the house more than one time.

Q Oh, he did?

A Uh-huh.

Q How many times did you speak with him?

A Whenever he called.

Q How many times did you speak with him on [340] the phone?

A I don't know.

Q Mrs. Williams, what is Terry's birthday?

A September 13.

Q Of what year?

A '55.

Q Excuse me?

A '55. When they went to school, I give them all their ages and told them to keep their ages.

Q When did you start into your heavy drinking, approximately when?

A Heavy drinking, it was before he was born.

Q But I mean when?

A In the '50's; it was in the '50's.

Q So it could have been '54 and could have been '50?

A '54 something like that. It was early, you know. It was in the '50's way before he was born.

Q How old were you then?

A I can't say exactly how old I was. I am 70 years old, and when he was born – I can't remember how old I was.

MR. DANIEL: No further questions,

* * *

[TESTIMONY OF NOAH WILLIAMS, JR.]

[342] A No. I was working, but my daughter has a fatal disease that she needs twenty-four hour care, so I am basically taking care of her until I find a place to live and have nurses take care of her for me.

Q Do you remember your childhood?

A Yeah, I remember it like it was yesterday, brings back a lot of good memories.

Q Do you remember the daily routine that your father had the kids do at home?

A Yeah, very well, sort of blurs in your mind a lot. When you get out of school, the first thing you do is do homework. If you didn't have homework – but most time you did.

After homework you did chores, and after chores if Daddy wanted you in the garden, then you go in the garden. And that is where you spent most of your day, in

the garden, because my father loved the garden, and that is one of the jobs you had to do.

Q What happened if you didn't stick to the schedule?

A Well, hopefully my dad, hopefully he would try to forget a beating. But ninety-nine percent of time, if you didn't do what he tell you to [343] do, you were subject to get a nice good beating from my father.

Q Can you describe for me, Noah, how your father beat you?

A Well he had two ways of beating you. One way was that he would have you to bend over and put your head between his legs, so the only thing he saw was your rear end. That is basically what he wanted, and he would whale away.

The second way that he would punish us was that he would get a belt. And well first of all he would tell you if you knew you were going to get a beating, he would tell you to go in the room and strip or take your clothes off.

And my dad, he was not the kind of person that wanted underwear on or a tee shirt, he wanted you buck naked so he could have his little good beating.

And when he beat you, he beat. He would raise whelps, and sometimes in his anger he wouldn't particularly care what he swung at. He would try to catch you from the waist down, but sometimes if you are trying to dodge, you might get a belt across the face or something. So he was out for punishment.

[344] Q Can you tell me about your parents' drinking? Did your father drink?

A Yes, he was a very heavy drinker. What he would do, and he would let's say for instance for Thanksgiving he would start drinking on Thanksgiving, and it would continue until after New Year's.

Q Did your mother drink?

A Mom didn't too particularly care to drink. My father would tell her come on take a drink, come on take a drink.

My mom didn't want to be sober – well, she wanted to be sober, but my dad would tell her come on take a drink, come on take a drink. I guess he would feel better knowing that my mom was drinking right alongside him.

Q What did you kids do when your parents were drunk?

A Well that was basically the only time we had a break. Because if things needed to be done around the house, we sort of overlooked it, and that was our break.

And sometimes we would say while mom and dad drunk, we can have a good time until they sobered up to where they realized what was supposed to be done wasn't being done.

[345] Q Did your parents ever fight?

A They fought constantly. We was too small at the time to try to stop it. My dad would really get into a good hard fist fight with my mom.

And my mom wasn't that big; she would try to fight him off. What we had to do, my brother, O'Harold, he was next to the oldest. What we had to do was go run and find him in order to come back home to try to break up the fight.

A lot of times when he was there, the fight was – they had already calmed down a little bit. And he would look around, be there for a couple of a minutes.

I, along with my other brothers and sisters were sort of scared, and we wished that O'Harold would stay there because we knew that once he had left, they would start right back at it again.

Q What would Terry do while they were fighting?

A A lot of times Terry wasn't home a lot, but the times he was home, he would sort of huddle up in the corner shaking, crying.

Where we live, most of the time Mom and Dad, they would sleep in the living room. And that was basically the family room, that is where [346] everybody would get together to watch TV and stuff like that.

And there is a little corner in the room where either I would stay because I was sad or he would stay or whoever got this corner first would be there.

Q Can you describe what Terry was like as a child for me, what your memory is of him?

A Well, he was a spicy, energetic young boy. One of the problems that he had was that he ran with the wrong crowd, for one thing.

And I was spicy, I used to run around with the wrong crowd, I used to do that for attention, but I have learned my lesson, so I don't mess with that no more.

But Terry would always be around the wrong people. He was very, very, he could be influenced very easily, very easily influenced.

Q Was he a good student in school?

A Not really. He always, he hardly ever go to-school. That was one of the requirements that my dad was very strict about, that you needed an education.

And he would know whether my brother Terry would be in school or not because the [347] teacher would call or bring a note home. If he wasn't at school, then I would get a note and bring it home to Mom or Dad. Chances are probably give it to Mom.

Q Then what would happen?

A Well if Terry came home that night, he would have gotten a beating. But a lot of times he wouldn't come home at night, and that was to avoid getting beat.

Q So he knew if he didn't go to school, he was going to get a beating?

A He knew that if he didn't go to school, he knew if he didn't do his work he was going to get a beating. There was a lot of things that Terry knew he should have done, but for some reason he just didn't – he didn't do like we did.

We knew that when we came home from school, we had chores to do. Well for some reason he just didn't – it

just didn't get in his head right for some reason. He just didn't, for some reason he just defied anything Dad would tell him.

Q What would Terry do to avoid getting a beating?

A Well, let's see, he would, Number 1, stay out all night long. My Dad would tell me or my [348] brother to go find him.

Well a few times we did find him, but see we knew what was going to happen. We knew he was going to get a severe beating. And so a lot of times he would say please, please, I mean he would beg and he would cry and he would plead with me and my brothers not to take him home.

I felt sorry for him, my brother felt sorry for him, we would both look at each other and say, what should we do? We will just tell Dad we couldn't find him.

Q Can you tell me about the time Terry fell off the roof? How old was he then?

A I think he was somewhere between maybe 10 and 7, somewhere between the ages of 8 and 12, somewhere along there.

Q Were you there?

A Yeah, I was there. What it was is that there was called Grasty school, we used to play baseball there.

And some of the guys used to get on the school building just to have an overview of the playing field. And what we would do was sit on the edge of the brick wall.

And what we do is lean back and [349] catch ourselves before we fall. Well I guess Terry was trying to do the same thing, and he was doing this. And all of a sudden, for some reason his fingers slipped and he fell back and head first on the concrete pavement.

Q And what happened?

A He had passed out, and I am not too – I am not too familiar exactly what happened after that. But I know for a fact that – let me try to say this – if any of the other of us got into any trouble, for some reason if anything on the outside, like the police came by for some reason, my Dad wanted to find out why. And if it was one of us, pheww, it was a nightmare.

Q When Terry fell off the roof, how high up was the roof?

A I would say anywhere between ten and twelve feet. It was a high roof. You just couldn't jump up there, you had to climb a gutter in order to get up on that section of the roof, and it was a small Section of the roof.

Q And he fell off backward and landed on the back of his head?

A Yes. That is where he got his nickname chick from, because he had a little bump back there. [350] It was a chicken egg, so that is where he got his nickname Chick from.

Q Okay, let's talk about the trial. You were in the Army during Terry's trial?

A Yes.

Q Did Mr. Motley or Mr. Smitherman ever try and contact you?

A To be honest with you, I am not really sure. When I was in the service, I was in the 57th Battalion we went a lot of places. A lot of times I was not allowed to tell my family where I was at because of security reasons.

So to be honest with you, I am not sure. I know I heard something about the trial, but it wasn't as clear because a lot of things was going on in my life at that particular time, military-wise and family-wise.

Q If they had called you, would you have gotten emergency leave and come home?

A Absolutely. That is one of the things that my captain and platoon sergeant try to stress is that any time there is an emergency in the family, what they like to do is try to get you out of the military situation so that you can take care of whatever family emergency arises so it will not [351] affect your job performance.

MS. TARLOW: Thank you, Noah, I don't have any more questions.

CROSS EXAMINATION

BY MR. CONDON:

Q Mr. Williams, you were stationed at Fort Bragg?

A Yes, sir.

Q 82nd Airborne?

A Yes, sir, the 53rd Battalion.

Q My daddy was in the 82nd a few years before you. Have you ever been diagnosed as having fetal alcohol syndrome?

A No, sir.

Q You were born about a year before Terry?

A A year and a couple of months.

Q Did you have a lot of, when you were in the service, did you have physicals?

A After the service?

Q No, in the service?

A Yes, if you needed one. I mean, you go get certain blood tests and stuff like that.

Q And you knew about the trial but didn't come to it?

A See, what it was, I was calling my mom [352] or writing letters more or less, and it was sort of bits and pieces, because I couldn't get too much information at the time. I try to keep up with what is going on because it is my home town, so I try to keep up.

Q Fort Bragg is not that far away?

A Well it is about a three-hour drive.

Q And you said your daddy was a hard worker?

A Yes, he worked hard.

Q He had a job?

A He was working in the mill.

Q Did he work –

A I am sorry, tobacco company. He was a janitor at Westmoreland High School.

Q Did he work two jobs?

A Actually three jobs.

Q So he worked hard to support his family?

A Yes, sir.

Q And then he would come home and make you all do the chores around the house?

A Yes, sir.

Q Let me ask you this, have you ever been convicted of anything?

A No, sir.

[353] Q And you grew up under the same conditions and in the same household as Terry?

A Yes.

Q How about Larry, has he ever been convicted of anything?

A No, sir.

Q He grew up in the same household?

A Yes, sir.

Q How about Jerry, has he ever been convicted of anything?

A He has been in any little trouble, not anything big.

Q He grew up in the same household. How about Olivia, has she ever been convicted of anything?

A No, sir.

Q She grew up in the same household?

A True.

Q And the same questions for Odessa and Laverne?

A Odessa was sort of on – I wouldn't exactly say she was on the wild side. She was a little unsettled.

Q Has she ever been convicted of murder or grand larceny?

[354] A No.

Q She grew up in the same household?

A Oh, yes.

Q How about Laverne, has she ever been convicted of anything?

A No.

Q And she grew up in the same household?

A Yes.

Q Same parents, same conditions?

A Same.

MR. CONDON: I don't have any further questions.

Q Oh, one other. You did have an honorable discharge?

A Yes, sir.

MR. CONDON: Thank you.

THE COURT: You may step down.

* * *

[Testimony of Dr. Robert Brown]

[358] Q What is your experience what is the level of your experience in treating patients for depression?

A Most of the patients I treat are depressed.

Q And over the years since 1971 that you have been a psychiatrist, how many patients would you say that you have treated for depression?

A Hundreds if not thousands.

Q Do you have experience treating lawyers for depression?

A Yes, I have.

Q Has that been an ongoing part of your practice?

A Yes, it has.

Q And is part of your practice right now?

A Yes, it is.

Q I think that you just stated that in your responsibilities with the Social Security [359] Administration, you review records and render opinions. Is that common in your profession, the reviewing medical records in the process of arriving at opinions?

A Yes, it is.

Q Why is that the case?

A Well it has to do with disability claims based on emotional problems. That is principally what I do it for the Social Security Administration.

Q When you treat patients, is there occasion when that patient has already been treated by other doctors?

A Yes.

Q And would part of your regular practice be gathering those records and reviewing the records of prior treatment by doctors?

A Yes.

Q In preparation for this trial, did you review Mr. Motley's deposition taken in January 1995?

A Yes, I did.

Q Did you also review the medical records of Mr. Motley from June 1987 through the early 1990's?

A Yes, I did.

Q Did that include the records of Dr. [360] Gaddy, an internist, from June 1987; and Dr. Fletcher, a psychologist in '87 and '88; and Dr. Hartman in 1987 at Lewis-Gale Psychiatric Center; and Dr. Ashby, a psychiatrist from Danville from '88 through '90; and then finally Dr. Beshara and Jane Shield in Richmond during the period 1990 forward?

A Yes, I reviewed those records.

Q Do these records reveal that a diagnosis had been reached regarding Mr. Motley?

A Yes, sir.

Q And what was the diagnosis?

A There were several diagnoses given. The first was major affective disorder. He was also diagnosed as having a dysthymic disorder, which is a chronic, less severe form of depression.

Dr. Beshara diagnosed an anxiety disorder not otherwise specified. Dr. Shield diagnosed recurrent major depression as well as dysthymia.

Q What are the symptoms of major affective disorder?

A To have a diagnosis of major affective disorder, you must have a depressed mood or a serious loss of interest in many things. Also there is usually problems associated with sleep, appetite, [361] energy level, interests, maybe preoccupation with death, perhaps irritability, difficulty concentrating, slowed thinking.

Depression has often been compared to a hibernating bear, someone who just goes into a room and isolates themselves.

Q Did those medical records indicate that from the period 1987 through the period of time in which he was treated in Richmond, as well, that Mr. Motley received treatment? In other words, what was the type of treatment that the doctors gave Mr. Motley?

A He was treated both with medication and psychotherapy.

Q Is it common during the course of treatment or is it a regular practice in the psychiatric profession to

inquire of the patient concerning how long the depression has lasted?

A Yes, it is important to take a history.

Q And is this something that doctors would make notations and records concerning the longevity of the illness?

A Yes.

Q Why is this important?

A It is important to make the diagnosis as [362] accurately as possible and to tailor the treatment to the diagnosis.

Some forms of depression come and go, some stay at a fairly low grade level, some are associated with the opposite, a very high mood, so it is very important to get a baseline level of the mood level and psychological functioning in general.

Q Did the doctors' records that you reviewed, did they indicate the longevity of the illness that Mr. Motley suffered from?

A Yes, they did.

Q Was that according to the statements made to the various doctors by Mr. Motley?

A Yes.

Q What did the records indicate?

A The records indicated he had been depressed for as recent as six months and for as long as he was a senior in college.

They were described as problems with depression, bouts of depression, recurrent depression. I think that is about it.

Q And according to the medical records that you reviewed, did those records concur that Mr. Motley stated that he was suffering from depression during the period 1986 and 1987?

[363] A There was no specific statement that he made in those records that he was suffering specifically during that particular period of time, but that is a time that is inclusive within the periods that were described by him through I think four different psychiatrists.

Q So that for instance when he spoke to Dr. Fletcher in September of 1987, that he told Dr. Fletcher that he had been depressed for two years, that would include '86 and '87?

A Yes. As I said, I think he told Dr. Fletcher that he first became depressed as a senior in college and had been dealing with depression off and on since that time.

Q Is it unusual for a patient suffering from depression to delay seeking treatment, his initial treatment?

A It is very common. One of the problems is that it is such an illness, sometimes the patient is the last one to know what he has.

Sometimes they are relieved to be told that they have depression, because it tends to get primarily into their sense of themselves, their self-esteem.

It is one of the few diseases as [364] which one describes himself as depressed. one may say I am

depressed after they find the diagnosis. It is not like I had a heart attack, I had pneumonia, I had a broken leg, I had a stroke. It is my very nature, I am depressed.

Q Did you also have the opportunity to review records from the Virginia State Bar relating to discipline of Mr. Motley during the period of 1986 and 1987?

A Yes, I reviewed disciplinary records covering the period beginning in 1982 and going through I think 1987.

Q And did you review both the reference to the private reprimand issued in November, 1986 and then the public reprimand issued later, and then the suspension of his license to practice law for a hundred twenty days?

A Yes, I did.

Q Did this discipline indicate the type of misconduct which led to the disciplinary penalties?

A Yes, it did.

Q What type of misconduct was cited by these records?

A The inability to meet deadlines, to keep minimally acceptable accurate records, to settle a [365] marital dispute in a timely manner with regard to settlement of property. It had to deal with things that are mostly associated with symptoms of depression.

Q And that would include inability to concentrate on details and procrastination?

A Yes.

Q Were you present at the courtroom yesterday when Mr. Motley testified?

A Yes, I was.

Q Were you present when he testified that in retrospect his depression was linked to the misconduct which resulted in the bar discipline?

A Yes.

Q Were you also present when Mr. Motley described his failure to obtain records regarding the Terry Williams case from the Department of Corrections and Youth and Social Services and medical records, school records and other documents relating to his representation of Terry Williams?

A Yes.

Q Were you also present when Mr. Motley testified that he never went to Henry Street to interview the family or neighbors?

A Yes.

[366] Q Now in your experience as a forensic psychiatrist, is that unusual for attorneys that you have worked with in serious felony cases?

A It is very unusual.

Q Why is that?

A Because in capital cases it is extremely important especially to have all the background records in order to follow any leads, both for penalty as well as for sentencing.

Q And is that conduct also consistent with the pattern of procrastination and failure to attend to details that you have already testified to?

A Yes.

* * *

[368] Q Dr. Brown, based on your review of Mr. Motley's medical records, his deposition, your review of his discipline by the Virginia State Bar, your observation and evaluation of his testimony yesterday, have you been able to reach an opinion to a degree of medical certainty concerning whether Mr. Motley was suffering from depression from July 1986 through September 1987?

A Yes, I have.

Q What is your opinion?

A My opinion is that he was suffering from depression during that time.

Q Mr. Brown, I want to go back. Have you [369] been involved – how many cases have you been involved in involving serious felonies up to and including capital murder cases?

A I have been doing this kind of work since 1971. I don't have an actual number. I have done many forensic psychiatric evaluations mostly for the defense in serious criminal cases, including capital murder cases.

Q Have you been appointed as an Ake, A K E, Ake expert in cases?

A Yes, I have.

Q What is the role of a court appointed Ake psychiatric expert?

A I think it is to render an opinion regarding mitigation and mental status at the time of the offense as well as to assist the defense team both at the penalty and sentencing phase.

Q Does that include also, does that encompass trial preparation?

A Yes, it does.

Q In your experience since 1971, what has the role of attorneys been as far as gathering information, identifying witnesses and obtaining records for the forensic psychiatrist to review?

A I have usually been provided with fairly [370] good background information. I often have to ask for more information, as well, and cooperate with them and spend a fair amount of time with these people.

Q And why is it necessary for the attorney to provide background, as you said, background facts?

A I don't think it is possible to arrive at a reasonable, valid, accurate psychiatric diagnosis without background records and information.

Q And what type of background records and information would a forensic psychiatrist look for or want, to be able to render a reliable evaluation?

A You want to have medical records, academic records, criminal records, military records if they exist, employment records, have an opportunity to talk to significant people in the defendant's life, especially family members or relatives or employers, teachers, people who knew this person well.

Q Would that also include records from youth and juvenile services, things of that nature?

A Yes.

Q And also correctional records to see how the defendant has adapted to the prison environment?

A Yes.

Q Now for instance when you were asked to [371] assist in the state habeas proceedings with Terry Williams, did you seek the records that we have just discussed?

A Yes, I did.

Q And did you also personally interview important people in Terry's family and background?

A Yes, I did.

Q For instance, did you interview Lula Williams?

A Yes, I did.

Q Is that Terry's mother?

A Yes, it is.

Q And what did you find out when you interviewed Lula Williams?

A I interviewed her here in Danville in July 1989. She told me that she did not see a doctor while she was pregnant with Terry Williams, that he was born at home, that he was the smallest of her children, most of whom were small, he weighed four pounds.

He was delivered by a midwife, he was very slow learning to walk and talk. She admitted that she drank heavily during her pregnancy with him.

Q Did those facts, did you keep any [372] written records of your interview? Is that your practice?

A Yes, it is.

Q Did you have an occasion to review your interview notes with Lula Williams in 1989?

A Yes, I did.

Q After those facts that you just recounted about her drinking when Terry was in utero and his low birth rate and the other characteristics you just described, did you make any notations in your records after she described that?

A Yes. I wrote fetal alcohol syndrome right after her name after about the fourth line of talking with her about this. Also make audio tape recordings of all my interviews with Mrs. Williams and other members of his family.

Q And would the fact that when you had noted fetal alcohol syndrome, did you feel that that warranted a closer look as far as tests with Mr. Williams?

A I was more impressed frankly with the history of multiple injuries of his head. And I thought that he needed neuropsychological testing and a scan of his brain, either a CT scan or an MRI.

Q And are there particular doctors who – I [373] am not going to ask much about fetal alcohol syndrome because we are going to get to that this afternoon, but is that something that a psychiatrist normally deals with or are there specialists who deal with that syndrome?

A I think psychiatrists are expected to make the diagnosis or raise the question of a diagnosis and note it and then refer them to a specialist in the field, either

geneticists, dysmorphologists or others who deal with this.

Q Now you stated that you have worked with attorneys in serious capital cases, including capital murder cases, as a forensic psychiatrist?

A Yes, I have.

Q And you also have extensive experience treating attorneys for depression?

A Extensive, I am not sure that I said that. I have one law student and two attorneys right now as patients currently, and I have been treating university community members since 1971 so . . .

Q Would you say that from 1971 to the present that you have throughout that entire period been treating lawyers, for instance?

A Yes.

Q Now a lawyer who was suffering from [374] major affect disorder, severe depression, who was not being treated by psychotherapy or with medication, do you have an opinion on whether a depressed lawyer, a lawyer depressed to that magnitude, do you have an opinion to a degree of medical certainty whether such a lawyer could effectively attend to the [sic] all the detailed work associated with representation of a client accused of capital murder?

A It would be very difficult for a depressed attorney to meet the requirements of practice, especially in capital cases.

Q Is that your opinion?

A Yes, it is.

Q And in reviewing the various materials that you have been reviewed in connection with this case and listening to the testimony of Mr. Motley, is it your opinion that his depression affected his performance in this case?

A Yes.

* * *

[385] Q I think that when you described the symptoms, that part of the symptoms or several of the symptoms was procrastination, inattention to detail, inability to concentrate; is that right?

A I didn't use the word procrastination. I said slowed down photurically and cognitively. I certainly said trouble concentrating.

Q Again there was a focus during the cross on the medical records, but weren't those symptoms fully consistent with the conduct which led to the discipline with Virginia State Bar?

A Yes.

Q And the inability to keep records or to meet deadlines and things of that sort?

A Yes.

[386] Q And in your treatment of depressed patients, is that typical of depressed patients' characteristics?

A Yes, it is. It is very, very hard for them to keep up.

MR. POWERS: I have no further questions.

THE COURT: I didn't hear the last answer.

THE WITNESS: It is very, very hard for them to keep up with the requirements of life.

* * *

[TESTIMONY OF DR. THOMAS L. PINCKERT]

[407] Q And I would like now to talk about Terry Williams. You reviewed a series of records in preparing to examine Mr. Williams and preparing your report; isn't that right?

A That is correct.

Q And I believe you listed these records in your report?

A Yes, I did; fairly long list.

Q Yes, it is. Did you perform a physical [408] examination of Mr. Williams?

A Yes. I traveled to Mecklenburg Correctional Center on the 10th of June of this year 1995 to examine Mr. Williams in the penitentiary.

Q And what was your diagnosis?

A My diagnosis based upon Mr. Williams' physical findings was that of an individual who suffered from fetal alcohol syndrome.

Q Do you know whether there was a history of Mrs. Williams consuming alcohol during her pregnancy with Terry?

A The affidavit that was included in the records that I reviewed indicated from Mrs. Williams, testimony

that she drank very heavily during her pregnancy, often five days a week drinking virtually all day long as she described it, occasionally having one or two off, and sometimes drinking seven days a week.

Q How does this amount of alcohol rate in terms of toxicity to a fetus?

A Oh, it is terribly toxic to a fetus.

Q Did you also review court records of Mrs. Williams' conviction for bootlegging?

A Yes, I did.

* * *

[411] That is, it causes these organs that are exposed to that to not form correctly. Alcohol exposure in the second trimester predominantly causes miscarriage.

If the mother drinks very, very high levels at that point, oftentimes there are miscarriages that occur with that.

And I believe in Mrs. Williams' record, it is indicated that although she had twelve pregnancies with living outcomes, she also had 3 miscarriages, which would be fully consistent with someone who was drinking.

And then lastly, someone who continues to drink in the third trimester of pregnancy, the alcohol acts differently, and it causes the growth retardation we were describing.

* * *

[421] Q Dr. Pinckert, I would like now to get back to Terry. And if we can point out the facial features on

Terry's face, that would be more accurate than the drawing.

A Sure.

Q And we are going to videotape this so that Judge Ingram can watch it on the screen.

(VIDEOTAPE SHOULD BE VIEWED ALONG WITH THIS TESTIMONY.)

Q You were going to show us some facial features on Terry's face which led you to diagnose him as having fetal alcoholic syndrome.

A Mr. Williams, are you okay? I am sure [422] you are. I am going to ask you if you wouldn't mind to just hold your face as still as possible and keep your face as level as you can, chin down just a tad bit.

All right, what I would like to point out in looking at Mr. Williams' face here is that he has some facial asymmetry right here. This portion of his face is flatter than this portion.

And if you will look, his left eye opening is smaller than his right eye opening. And his left eye is slanted slightly upward. In other words, it doesn't sit like that, it sits more like that. That is very, very common.

He has, if you will notice, this eye looks like it is a little bit puffy, but in reality what he has, he has some drooping, what we call ptosis of this lower lid.

The same thing is true for his left upper lid. If you look, there is less of his iris that is visible on his left eye than in his right eye because the lid comes down a little bit further.

I won't redo the measurements, but I will tell you that the size of his eye openings is far smaller than two standard deviations, which [423] would put it somewhere around the third percentile for eye opening size.

In addition, if you look at the space between what we call inner canthi, that is the inner portion of his eye, to the inner portion of his eye, that is well larger than ninety-seven to ninety-eight percentile for adult males.

And the same is true for his interpupillary distance, that the distance between the pupils is widened because the eyes are shifted somewhat laterally.

In addition, as you can see, Mr. Williams has a fairly full upper lip like I described for you that is common in many African-Americans, but if you notice the area of his filtrum is fairly long.

And anybody could come over and see, there is very little distinction such as many of you might look in the mirror or whatever yourself and look at someone around you, Mr. Williams' lip is very, very smooth.

His whole face is somewhat asymmetric because there is some flattening over here. If you look, his eyes are somewhat slanted, his whole face, his jaw and everything is slightly asymmetrical up this way.

[424] The jaw feels like it is normal in its size, but it is just shifted upward because of that.

Now, Mr. Williams, could you open your mouth for us please, real wide. And I think it would be easy to show you that he has bad teeth. I think that is the best way to describe it.

He has teeth missing and he has got a space between his teeth. And in fact Mr. Williams wears a partial because his central incisor on the left side is gone.

And when he takes his partial out, you can see the teeth are quite malaligned, they are twisted almost like peg type teeth, as well as the enamel is very, very poor on the teeth. And that is something we see in and above poor dentition or brushing or anything of that particular nature.

Mr. Williams, would you hold your hands straight out for me, please. If you look at his hands, he has got a fine motor tremor. it is more easily seen if you put like a piece of newspaper or a sheet of paper on there. But it is like this, it trembles.

In addition, he has these somewhat what we call hyperconvex, spoon-shaped sorts [425] of nails and very slender little fingers. Now could you try and roll your arms outward for me, palms up?

And you see, he is able to rotate this one flatter than this one. This is as far as he can get. And that is the radial ulnar synostosis that we – we are all doing it here now – but most people can rotate their thumbs or their wrists completely around; he cannot.

And that is very, very characteristic of somebody who has been somewhat restricted in utero due to alcohol exposure, not able to move those. And when those joints form, they don't form as fully as they would in somebody not exposed to that. And so, therefore, he is stiff, he can't move those out.

I think that is probably as much as I can show you right now. Thank you, Mr. Williams; appreciate it.

Q Dr. Pinckert, there were a few facial characteristics on the chart and that we have seen in your slides that Terry does not exhibit.

You have already explained to us about the thin upper lip being something that wouldn't be obvious in an African-American. How about the low nasal bridge, is that something that –

[426] A Again, I think if you measure Terry's nose, Mr. Williams' nose, from the root to the tip, his nose is somewhat shorter than average.

But of course there is natural variation and again there is some racial differences, as well, because many African-Americans tend to have a fairly flat, broad nose anyway.

Q Does that particular facial characteristic change with age?

A It does tend to modify. The nose tends to grow, the jaw tends to grow, as I described. So features that are more prominent at an early age tend to become less so as the individual matures.

Q I would like to talk about growth deficiency now. You reviewed records from the Virginia Department of Youth and Family Services. Did you note anything in those records documenting Mr. Williams' growth?

A May I refer to my report?

Q Sure.

A Yes, I had a large volume of essentially youth records to refer back to. And as I said, I have a birth record or a birth certificate from Mrs. Williams.

There was no birth weight listed [427] on it, and the birth weight of four pounds was as indicated in her affidavit. As I mentioned before, that is far, far below the third percentile. Actually it is more like what you would expect to see in an average thirty-two or thirty-three week gestation, so much smaller than you would anticipate.

I found on 11/67 that Mr. Williams was fifty-five inches tall and sixty-eight pounds. That height is equivalent to eighth percentile and weight was less than fifth percentile.

Again on 3/71 there were additional court records that indicated he was found to be sixty-three inches tall, that is the twelfth percentile, and a hundred ten pounds, which was the eighth percentile.

At the time of my examination, Mr. Williams was found to be at the twenty-fifth percentile for height and the fortieth percentile for weight.

Q Thank you. Could you just briefly recount for us the actual physical defects to the brain and what organic brain damage is, how the brain is damaged by alcohol, and just physically how the brain is damaged and how the connections are not working?

[428] A As I mentioned before, when there is severe alcohol exposure to the developing brain, there is cavitation of the ventricles. The ventricles normally have spinal

fluid in them, and they are normally like small slits, as you saw on the previous slides.

When these infants' brains are forming, those connections do not get together and you have large spaces, large empty holes where normal brain tissue should have formed that is not there.

As I indicated also a very important aspect of the brain halves is that they communicate back and forth through something that we call the corpus callosum.

That is frequently absent as described in that slide that I showed you, and it is a very common finding in infants born with fetal alcohol syndrome.

In addition, there appears to be damage to the frontal lobe which essentially controls our conscience and our ability to make informed decisions and understand, in other words.

Q Did you see any other physical symptoms in Terry that led to your diagnosis that you haven't pointed out yet but that you did include in your [429] report?

A Yes. In addition to the things that I noted, he has the facial features that I described and in his mouth, he also has upper thoracic scoliosis, which is a common finding.

In other words, when he bends forward, if you look at his spine, his spine does not just bend forward, it curves. And so that is probably due to abnormal ligament texture.

And again we think these babies are somewhat fixed in utero, and so that doesn't form in a nice straight line

like most of us have. And so they get these bulges, and so they frequently have back problems associated with that.

I did not hear a heart murmur on Mr. Williams but again that is not found, or a heart lesion is not found in every case. And an auscultation or listening to the heart is not as accurate as more accurate sonogram that might tell more subtle distance.

I also found that Mr. Williams had difficulty when we did a brief neurological examination with balance and with we call rapid alternating movements.

We do rapid alternating movements [430] where we have them move their hands back and forth or put their fingers together or like the type of testing that you do for sobriety where you have them tip their head back, shut their eyes, and put their finger to their nose.

Mr. Williams had a great deal of difficulty with that. When I asked him to stand on one foot, he practically could not do it when he was standing on his right foot, his balance was so poor.

He was able to do it a little bit better on his left. And that goes along with cerebella damage, as well. And when I asked him to do the sort of can you walk the straight line, that is what we call a heel-toe walk where you put one toe right behind the heel of the other and keep going, Mr. Williams was unable to do this. So he clearly has neurological deficits, as well.

Q I would like to talk now briefly about what the knowledge of these sorts of physical problems would have been in 1986. The examination that you did on Terry on June 10, were doctors knowledgeable enough to do

that sort of examination in 1986 or is this a new thing that has recently developed?

A No, Mrs. Tarlow, it is clearly not a new [431] thing. As I mentioned I think briefly in my discussion, there were about two hundred articles in '79, and by 1985, the time that Mr. Williams was in the penal system, there were more than two thousand articles in things such as the Lancet, in the JAMA, the Journal of the American Medical Association, New England Journal of Medicine, a variety of very well-known, notable medical journals published a great deal on these sorts of things.

In fact, in 1981 the Surgeon General issued a warning to pregnant women stating that pregnant women should not drink alcohol while pregnant or while attempting to become pregnant. So clearly there was a body of literature that was available to the practitioners.

I think that as I said it is imperative that someone who would make this diagnosis would be aware of the diagnosis, that they would be trained as a geneticist to make these subtle, dysmorphic or dysmorphological findings that we made.

And in addition I think it would be important – you can make the diagnosis without a knowledge of maternal alcohol exposure, but certainly if that was known that would have, along with Mr. Williams' short stature and his long documented [432] history of school problems as far as learning disabilities and infractions with the law as well as behavior problems, I think clearly somebody should have tumbled to this in 1985 and '86.

Q That was my next question, actually. if his symptoms are so obvious and he was in a psychiatric hospital being evaluated by forensic psychiatrists and psychologists, why didn't these people ever catch this and diagnose him?

A Well probably for the reason that geneticists feel that geneticists should be doing these evaluations. Psychiatrists are not adequately trained to make these types of diagnoses no more than they would be trained to do heart surgery.

Q What kind of information would have flagged to the psychiatrist at Central State Hospital that they should be looking further?

A Well I think a variety of things. One, Mr. Williams' small stature; two, his longstanding behavioral problems. And by behavioral problems, I mean things as far as school records, learning disabilities, and his multiple infractions with the law.

Q Would a history of maternal drinking have been a factor?

[433] A Clearly that would have been a factor, but my personal bias as a geneticist is that any male who is found to be learning disabled with these sorts of things, that that diagnosis should be considered as part of the general workup of why his mental retardation or learning disability is present.

Q And you teach at Georgetown Medical School; isn't that correct?

A That is correct.

Q And you teach doctors about fetal alcohol syndrome?

A That is correct.

Q And when you prepare your students to practice, do you hope that they will be able to diagnose this syndrome or do you instruct them to seek the assistance of a geneticist or dysmorphologist to make the diagnosis?

Do you give them enough to expect that they will see some warning signs and call someone else in to make a diagnosis or do you think that they are qualified to diagnose on their own?

A I would like to think I didn't do my fellowship for no reason. But, no, I hope that when I am through with my students and my residents that they are capable of knowing this is an entity that [434] exists out there and that when there is a history of maternal alcohol abuse, that they would refer the patient on to the appropriate expert who can make the diagnosis and do the appropriate testing, triaging, and also establish the appropriate management and care guidelines for someone. None of my students who are residents are capable of doing that.

* * *

[CROSS EXAMINATION]

[454] We have had testimony from two forensic psychiatrists, one of whom was board certified who essentially said – and they examined Mr. Williams back in '86 – and they have essentially ruled out FAS. I don't know if you knew that or if you care to comment on that.

A I would be glad to comment on that.

Q All right.

A I don't think a clinical psychiatrist is qualified to make a diagnosis of fetal alcohol syndrome.

Q Psychiatrist?

A Psychiatrist, period.

Q Forensic?

A I don't care if they are – I don't believe that a clinical forensic psychiatrist is qualified to make the diagnosis of fetal alcohol syndrome unless they have received formal training in genetics and dysmorphology. They can certainly comment if they wish regarding learning disabilities or behaviors, but I think you are taking one aspect of the three out of context as saying, because they believe this, he doesn't have anything that would relate thereto.

And I think that is unfortunate [455] and also inaccurate. I don't believe that that is a qualified way to do it, personally. And as I tell my residents in medical school, if you don't look for it, your are never going to find it.

So if in 1986 they were as we say knowledge deficient in fetal alcohol syndrome, then it wouldn't surprise me whatsoever that they wouldn't make a diagnosis of a disease they didn't understand or had no knowledge of.

Q But if they found no neurologic abnormalities, which is one of the three categories of characteristics, why go any further?

A How can you say that Mr. Williams who has an IQ of 69 to 80 or whatever not having neurological findings when he has multiple psychiatric and psychologic

examinations saying that he has got a variety of issues. I am not sure what you are driving at.

Q I didn't say it. I thought the doctors, the psychiatrists did yesterday. You earlier on in your testimony, I thought you intimated somewhat that maybe there is what you would call a turf war between various specialties, and I assume that you consider that you with your knowledge are the best qualified to diagnose this?

[456] A Well I think that that is why we have an American College of Medical Genetics and why people become board certified in medical genetics so they can make diagnoses of genetic diseases and birth defects.

And I think the training is quite different to become a forensic or a clinical psychiatrist, although they are MDs. And I think that because of that I would agree with you that I believe that most psychiatrists do not have the proper background to make the diagnosis.

Q And again we don't know if there was anyone qualified in 1986, with your qualifications?

A I wouldn't know, sir.

MR. CONDON: Thank you, Doctor.

REDIRECT EXAMINATION

BY MS. TARLOW:

Q I just have a few things, Your Honor. Dr. Pinckert, when you make your diagnosis, if you are missing one factor or if you have a lower demonstration of certain other factors, how do you make your diagnosis?

Do you consider every single possible symptom that a person could have with fetal alcohol syndrome or do you look for a certain number [457] of things?

A No one individual fetal alcohol syndrome is going to have every single possible scribed finding associated with it. Just like any medical disease has got a variety of onsets, and as I was alluding to when I talked about the fraternal twins in the same environment essentially got exposed to the same alcohol exposure where some were more severely affected than others.

So obviously there is a genetic variation. So, no, I think that you look for the constellation findings.

One finding by itself does not necessarily make the diagnosis. And I did not mean to mislead the opposing counsel regarding like pegged teeth or whatever, like that thing of pegged teeth make the diagnosis for me. That is not the case whatsoever.

I am just saying that the findings that Mr. Williams has are very consistent with the diagnosis of fetal alcohol syndrome from the standpoint of stature, from the multiple physical findings that he has and his related behavior and learning disabilities.

* * *

[TESTIMONY OF DR. ROBIN LADUE]

[490] And I just want to briefly go through to give you an idea that even people who look what you and I would term as fairly normal still share the same pattern of brain damage and the same behavior problems, even though the external manifestation, the dysmorphology that Dr. Pinckert talked about may vary in severity.

But behavior problems that we see are pretty consistent regardless of the external features or the IQ. So just to give you an idea of the variety and severity of dysmorphology that we see among people with fetal alcohol syndrome.

And this is a young woman who has FAS, her baby does not because she did not drink during pregnancy. Her baby is normal. She is not raising her baby because she could not even take care of her own needs, let alone the complex task it would take to raise a child. Those are all my slides.

Q I notice that on a few of the pages of your problems and concerns chart, you note that violent behavior may be a problem?

A That is correct.

Q And I wonder if you could talk about that for a minute generically about FAS and whether [491] or not there is a propensity for violence in people that are fetal alcohol syndrome?

A I wouldn't say based on a research that there is necessarily a propensity for violent behavior. A lot of it depends on the underlying personality that people have, just as any person may or may not be violent.

Of a hundred people in a room, you may have some that are and some that aren't. The situation with people with fetal alcohol syndrome a lot of times is that they are not able to predict the outcome of their behavior and the outcome of dangerous situations.

So they get themselves in situations where they are very easily influenced. It is not that they are inherently

more violent. A lot of times it is simply not being able to understand that if you pick up a gun and pull the trigger, someone is going to get hurt. They don't follow out the logical consequences.

However, we have had in my experience for the past sixteen years, I have met maybe one or two people, maybe a few more than that, who had FAS and also really had sociopathic personalities, but that has been the exception rather [492] than the rule.

What we find is that the more structured and safe the external environment the person is in, the less issues we see them in terms of violence.

Q And now I would like to talk about Terry specifically and his history. You have reviewed a number of records regarding Terry, and you have set those forth in a report that you have compiled, and I won't ask you to describe them all again.

What I would ask you to do is, do you have a pen there?

A Yes.

Q Can you as we go through these sheets check off the boxes that apply to Terry? The first sheet is age zero to five years. And have you reviewed very much information about Terry as a baby?

A I have very little information about Terry up to the age of five other than as with many, many of our patients he was neglected and abused.

Beyond that, I also know that he was very small according to reports at birth, but beyond that I don't have

that much information really about his actual neurological functioning at zero to five years.

[493] Q Have you reviewed the affidavit from Terry's mother?

A Yes, I have.

Q And did you notice anything in that affidavit that would help you to note any of the problems on the first page?

A If I could have a moment to go through it again.

Q Sure.

A On Page 2 of her affidavit there are a couple of things take I noted, that she had received no prenatal care and that the children were removed from her custody for at least two years, and that Terry was abused when he was a child. I don't have the ages specifically on that.

* * *

[499] Q Could you turn to the last page, then, Dr. Doctor LaDue, age eighteen plus. And I would like to talk just as we go through, increased expectations as a patient by others.

Could you go through and tell me the things that you have noted in your report as significant in Terry's adult life?

[500] A Well it gets a little tricky, as I said, the problems we see in ages eighteen and up are based on the fact that he has had this neurological damage all his life.

And that the problems we are seeing, if we are seeing them at age thirty-one, they were there as the reports

indicate that I have and the background I have, all his life.

So it is a little difficult to just say well this happened at age thirty-one when the brain damage has been there.

But what I can do, and it is a little difficult because it may be talking about some of the findings that I found that are consistent with fetal alcohol syndrome and consistent with the problems we see at age eighteen.

Certainly the poor comprehension of social expectations. When I met with Mr. Williams last week and did the formal psychological evaluation, one of the scores that was definitely lowered on his Wexler Intelligence Scale was comprehension and similarities, which is a measure of abstracting abilities.

In the setting that he is in where he is protected, setting such as job training [501] doesn't apply, medical care doesn't apply, birth control doesn't apply, child care doesn't apply, economic support and protection don't apply.

And in a two-hour sitting in terms of the unpredictable and impulsive behavior, what I have are the test results that did not indicate that he was particularly aggressive or violent in terms of his personality, but that he is likely to be impulsive.

So even though I didn't see those things myself, the testing results would indicate that there may or may not be present, those things may or may not be present.

Q You talked earlier about follower behavior and about people with FAS not being leaders but being followers. Did your tests reveal anything about Terry in that or your interview with him?

A What I said is is that they tended to be more reactors and have difficulty planning out actions. They are not real good at planning, and the testing that I did certainly showed that.

There is one test called picture arrangement on the Wexler test that looks at a person's ability to pick out subtle social queues and to actually put a series of cards in order to tell a [502] story accurately.

And Mr. Williams had a very, very difficult time in doing that. And that is one of the things you look at, can they follow action and a story in a plan from beginning to end.

And he had a great deal of difficulty doing that. There were other tests that looked at planning and problem-solving ability, and those scores were lower, too.

Q And you also spoke about frontal lobe brain damage disrupting a person's ability to see the consequences of their action. And I am wondering if you could describe whether you see anything in Terry's records that show that same sort of problem?

A From the records or from the testing results?

Q From either.

A I would have to review the records real quickly, but certainly from the testing results in looking at the picture arrangement test, the block design test, and some

of the other tests on the intelligence test, his ability to problem solve and to plan were very, very compromised.

* * *

[507] Q Have you evaluated people with fetal alcohol syndrome for their competency to waive their rights?

A Not specifically.

Q Is that the sort of decision that we are talking about when we say complex decision, thinking through several steps with a final result that would have a significant impact?

A You mean specifically the decision to waive rights?

Q Uh-huh.

A It is a very complex decision that has all kinds of implications down the road that someone with FAS may or may not understand. It depends on several factors, how it is presented to them, how they are functioning on any given day, but that is a very complex decision.

Q I would like to talk a little bit about fetal alcohol syndrome and the reporting skills that a person would have.

You told me that you did some testing with Terry on this and found him to be highly [508] suggestible. Could you explain what that is and what that means?

A It was interesting in working with Mr. Williams that he would pick up information that Dr. Pinckert and I were sharing with him and it would become incorporated into his own self-report.

And sometimes it wasn't even accurate information, like how long he had worked in the tobacco fields. And it was as if he was agreeing to information almost completely without any understanding that the information wasn't accurate and what the inaccuracies would mean.

There were times when he gave inaccurate information when he would have been far better off, such as a drinking history, to give us accurate information.

So that again not really seeming to understand what he was reporting on and the consequences of what he was reporting on without making the connection of down the road of what all that would mean.

Q Is this an example of what you were referring to the eight ball, that the answer closest to the front of the brain sort of rises to the top?

A That would be a good example of it. It [509] is whatever is there is what you get. And in asking the same question of Mr. Williams a couple of times, we got different answers. And that is again consistent with what I was saying of how the brain works with people with FAS.

Q And you also said that he incorporated information you had provided to him into his story to you as if it was reality?

A That is correct.

Q With other people you have worked with with FAS and also in reviewing Mr. Williams' records, what kind of information are you talking about? Do people with FAS literally incorporate – would they read something in a book and think it was real?

A You are asking about five questions. Can you give me one question at a time?

Q How far does it go? Would somebody with FAS read a novel and think that that novel had really happened and was real?

A Perhaps, perhaps not; it depends on a lot of different factors.

Q How about watching a movie or television, I guess was the example you gave?

A Again, sometimes yes, sometimes no. I can give you an example of a woman I work with who [510] has three children with FAS. And her son has an IQ of about 105.

And he was shown some pictures one time taken just after he was placed in the adoptive home when he was very, very young. And he'll look at the pictures, and then he will come back, and he has actually done this with me a couple of times, and talked about these things as if he remembered them and create a whole story around these pictures where he would have absolutely no way of even knowing any of the details.

But when you ask him the accuracy of it, he would be absolutely sure that that was accurate. However you could tell a different story about the pictures, and you would get a different story back the next time you asked him about the pictures.

Q Would it be possible for a person with FAS to confuse their dreams with reality?

A It is possible.

Q I would like to talk about poor impulse control now. You had mentioned that poor impulse control is a hallmark of FAS. Did you see evidence of poor impulse control in Terry's records?

A In Terry's record or in the report?

[511] Q Well in his criminal records that you reviewed?

A In looking at some of the juvenile records, and this is one that I have heard a lot from our patients with FAS is pulling the fire alarm. We hear that a lot.

And when you ask a person why they did it, they couldn't even give you any kind of logical thinking. It was just like there and they did it. So that was an example, that was the one that stands out most clearly in my mind.

Q Dr. LaDue, when you are consulted with by courts to evaluate people for FAS, are you provided with –

A Excuse me, I need to get some clarification. Evaluating the consequences of FAS? Because I don't evaluate for FAS.

Q Yes, the consequences. Are you given material to review?

A That is always one of my requirements.

Q And what sorts of materials do you require?

A Well any time I am doing an evaluation, I want family records if they are available or at least a family history, school records.

[512] If it is for the legal evaluations that I do, I want any and all court records, any placement records. Preferably if we can get, which is not always the case, medical records.

So there is a whole list of records that I want ahead of time. I like to get if possible again if it is for the criminal system, police reports, victim statements, and things like that.

Q Who normally provides you with this array of information when you are doing work for the courts?

A It depends. If I am doing work with the juvenile system, it usually comes through the probation officer, sometimes through – generally through the attorneys.

It depends on which side, sometimes from the defense attorneys. But with the juveniles I work with, it comes generally through the probation officer.

Q And with adults that you work with?

A Generally through the attorneys.

Q Thank you. You reviewed the tests that Drs. Ryans, Mansheim and Centor performed on Terry Williams as part of their evaluations in 1986?

[513] A I reviewed their reports. I am not aware of a great deal of specific tests that they used other than the RORSCHACH. Said a Wexler was administered, but I was never able to find the actual report that indicated from that.

Q Why did you give different tests than those psychologists gave, first of all? And secondly why did their tests not reveal any neurological impairment?

A That is an extremely couple of difficult questions to answer. I don't know why our test batteries are different.

I have a very standard test battery that I use, and then I use some additional tests. Part of it has to do with research that I have been involved in that we have a standardized battery.

And then for forensic evaluation, for court evaluation, for competency evaluation, I always add several tests beyond that because I am looking for several things.

I want to make sure that my tests are giving me inter-test reliability. I want to make sure that the scores are accurate.

I want to make sure that I have [514] enough validity from the information that I get, so I tend to do a fairly large battery of tests. That is my personal preference just to make sure the information I get is reliable and valid. As to why our test battery is different, I couldn't speak to that. I don't know the motivation or reason why.

Q A RORSCHACH was given to Terry in 1986, as I recall?

A Uh-huh.

Q Do you recall what the results of that were?

A If I could look for a moment? From my understanding, it said that there was no signs of organicity, which I was a little bit surprised at, because generally the RORSCHACH is not used as a test for screening organicity.

But if I remember correctly, it also said that there were no signs of aggression or hostility. And if I can just take a moment here and find that report.

I have one here signed by Dr. Mansheim about him being oriented to time, place and space and about his memory and his intelligence being a little bit lower. But that is not the one I am looking for.

[515] Q It is Dr. Centor's, I believe.

A What it says, previous testing showed him to be functioning on borderline level of intelligence and he showed no sign of organicity.

His RORSCHACH was not different from his previous one and again showed no signs of hostility and aggression. It is believed that the patient is competent to stand trial and was competent at the time of the alleged crime. That is his in results and summary section on Page 2, report dated August 11, 1986.

Q And the results of your RORSCHACH were different?

A No, they were very similar. A little bit of immaturity, which you would expect given Terry's IQ and his social development. And again no overt signs of hostility or aggression. So they were consistent with what Dr. Centor found in 1986.

Q Just a few more questions. You have discussed the difficulty that people with FAS have in making decisions and that they will frequently give different answers to the same question?

A That is correct.

Q Do you think having reviewed the record of confessions, recantations, and subsequent [516] confessions that Terry gave and subsequent recantations, that that could possibly be explained by FAS?

A It is a pattern of behavior that is not inconsistent with fetal alcohol syndrome and with frontal lobe brain damage.

Q And you also spoke about people with fetal alcohol syndrome incorporating information they receive into what they perceive to be reality.

Do you think that the fact that there were six months between the time that Terry confessed and the death of Mr. Stone may have had an impact on the reliability of his confessions?

A That is a very difficult question to answer because I have no idea who Mr. Williams was associating with, I have no idea who he had talked to, I have no idea as to what information he might have gathered from any place around.

It is possible, but I couldn't draw a firm conclusion because I have no idea what he was doing during those six months.

Q You prepared a report regarding your psychological evaluation of Terry Williams?

A That is correct.

Q Is this the report that you prepared [517] regarding Terry Williams?

A Yes, it is.

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REDIRECT EXAMINATION

BY MS. TARLOW:

Q I just have two things to follow up with. In general throughout the country are there psychologists who specialized in FAS in 1986?

A Yes, there were.

Q And in your opinion how would Mr. Williams do in the future in a structured and supervised environment such as a prison?

A Based on the information in terms of how he has done in prison at this point in time, it can be expected that he would continue to do very well in a structured, supervised setting.

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[EXHIBITS INTRODUCED AT STATE HABEAS HEARING REPRODUCED IN SEPARATE VOLUME]

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF DANVILLE

TERRY WILLIAMS,
Petitioner,

V. Case No. LP88-81

J. D. NETHERLAND, WARDEN
MECKLENBURG CORRECTIONAL CENTER,
Respondent.

PRELIMINARY STATEMENT

Petitioner was tried by a jury in this Court on September 29 and 30, 1986, and was convicted of the capital murder of Harris Thomas Stone, while in the commission of the armed robbery of Stone. The jury also found the petitioner guilty of the robbery of Stone during the course of the capital murder and fixed his punishment at confinement in the penitentiary for seven years. On September 30, 1986, in the second stage of the bifurcated proceeding, the same jury fixed petitioner's sentence at death on the capital murder charge. Following receipt of a post-conviction report of a probation officer, this Court held a sentencing hearing on November 19, 1986, and entered judgment in accordance with the jury's verdicts as to both guilt and sentence. Williams' convictions and death sentences were affirmed by the Supreme Court of Virginia on September 4, 1987. *Williams* v. *Commonwealth*, 234 Va. 168, 360 S.E.2nd 361 (1987), *cert denied*, 484 U.S. 1020 (1988).

On August 26, 1988, Petitioner filed a petition for a writ of habeas corpus, which was answered in due course by the respondent. On August 8, 1989, argument was

heard in the Circuit Court of Danville, and resulted in the dismissal of numerous claims.

On or about April 24, 1995, the petitioner filed in this Court an amended petition for a writ of habeas corpus. The respondent filed a response to the amended petition on or about may 16, 1995. In that response, counsel for the respondent noted that this Court had previously dismissed the following allegations appearing in the amended petition: I(A), I(B), I(C), I(D), II(A), II(B), II(C), II(D), III(A), III(B), IV, V, VI, VIII(B), VIII(D), VIII(E), VIII(H), IX(A), IX(B), IX(C), IX(D), XI, XII(A), XII(B), XIV, XV. XVI and XVII.

Counsel for the respondent further noted that subgrounds VIII(A), VIII(G) and VIII(I) of the amended petition were new, and were allegations of prosecutorial misconduct, and as such, these subgrounds were procedurally defaulted under the rule of *Slayton* v. *Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974).

Ground X of the amended petition was also new, and is a substantive claim that petitioner's death sentence was based upon consideration of an improper aggravating circumstance. This, allegation X is procedurally defaulted under the rule of *Slayton* v. *Parrigran*, and it appears that petitioner is attempting what he previously attempted in ground XV of the original petition. That is, to have this Court review actions of the Supreme Court of Virginia. Finally, petitioner has not been granted leave by this Court to amend his original petition with new substantive claims.

On June 15 and 16, 1995, this Court held an evidentiary hearing on the issues of ineffective assistance of counsel. On or about September 1, 1995, counsel for the petitioner filed Petitioner's Proposed Finding of Fact and Conclusions of Law. Respondent's proposed finding of fact and conclusions of law followed.

On July 1, 1995, however, this Court lost jurisdiction over this case, pursuant to Virginia Code § 8.01-654.

On November 15, 1995, respondent filed a motion to transfer this case to the Supreme Court of Virginia, pursuant to Rule 5:7A, Rules of the Supreme Court of Virginia. The petitioner objected, and on February 14, 1996, oral argument was heard on respondent's motion. This Court granted respondent's motion and transferred this case to the Supreme Court of Virginia.

On March 22, 1996, respondent moved the Supreme Court of Virginia to remand this case to this Court, for the entry of findings of fact and recommended conclusions of law on specific claims. On or about April 15, 1996, petitioner filed an opposition to respondent's remand motion, arguing that respondent's motion "narrow(ed) . . . the issues which the Circuit Court could address . . . "

On May 6, 1996, the Supreme Court of Virginia entered an order directing this Court to "report its findings of fact and recommend conclusions of law regarding the issue of ineffective assistance of counsel, as alleged in Claim VII of the amended petition for writ of habeas corpus, to this Court pursuant to Virginia Code Section 8.01-654(C)(3)." on June 24, 1996, this Court heard arguments from counsel on the issue of the ineffective assistance of counsel claim as alleged in claim VII of the

amended petition. As a result, this report is submitted as to the findings of fact and recommended conclusions of law by this Court on that issue in accordance with the order of May 6, 1996 of the Supreme Court of Virginia.

FINDINGS OF FACT

I. Initial Findings of Fact

On July 8, 1986, E. L. Motley, Jr., was appointed to represent the petitioner on charges of capital murder and robbery. He also represented the petitioner on other charges of malicious wounding, grand larceny and arson. He was joined by Robert J. Smitherman who was appointed to serve as co-counsel on the capital murder and robbery charges several months later. Mr. Motley had previous experience in capital murder cases, but was afforded co-counsel as was the custom at that time to aid lead counsel in serious murder cases in this court. Mr. Smitherman had known Mr. Motley for approximately two years before the trial and they worked well together. Both Motley and Smitherman represented the petitioner leading up to the trial, during the trial, and thereafter on petitioner's appeal.

Petitioner alleges that he was denied his Sixth Amendment right to counsel because E. L. Motley, Jr. was mentally impaired and unable to effectively represent him in the preparation, trial and appeal of his complex, capital murder case. This court has heard evidence relating to this claim, but finds that Motley was not acting under a mental or emotional disability during the course of his representation of Williams. Specifically, Motley did

not begin to have problems related to his depression until the late spring or early summer of 1987. (H.Tr.22).[1] Williams' case was tried in 1986. His brief on direct appeal was filed in March, 1987. The opinion of the Supreme Court of Virginia was issued in September, 1987.

It is clear that what problems Motley did have thereafter did not manifest themselves during the trial of this case. (H.Tr.85). Motley prioritized his work by placing the criminal matters ahead of civil matters, and capital murder cases receiving the highest priority. Both Motley and Smitherman prepared the appellate brief, after being counsel in the trial of these cases.

During the two years that he knew Motley, Smitherman never noticed anything unusual about Motley's ability to represent clients. Smitherman noticed nothing unusual about motley during the course of Williams' trial. Smitherman did not begin to notice a difference in Motley's behavior until 1988. (H.Tr.177-178). Smitherman noticed no sign of any dysfunction in Motley during the time of their joint representation of Williams. (H.Tr.180-181).

Based on the testimony at the evidentiary hearing, and on the personal observations of this Court during the course of the criminal trial, this Court finds that E. L. Motley was acting under no disability during the course of his representation of the petitioner. Furthermore, to the extent that any claim presented by the petitioner herein is

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[1] References to the transcript of the evidentiary hearing shall be cited as "H.Tr."

based on the mental problems suffered by Mr. Motley, such claims lack merit.

In fact, at no time during the trial did Motley exhibit any conduct which would lead one to believe he was suffering from any disability.

The petitioner also alleges that he (Williams) is mentally retarded or suffers mental impairment such that he is not competent in several respects, but despite petitioner's claims, they are not borne out by the evidence. Petitioner obviously has some problems, but he is not mentally retarded and has an I.Q. of 73. (H.Tr. at 365) The petitioner was competent to stand trial. (H.Tr. at 214-215). The results of petitioner's EEG were normal, his neurological tests were normal, and his skull film was normal. (H.Tr.234, 237) Indeed, it would appear that petitioner suffers from no neurological abnormalities although it is apparent that he does have some problems. (H.Tr. at 316) The Court does not believe that the evidence clearly establishes petitioner suffers from Fetal Alcohol Syndrome or the lesser abnormality of Fetal Alcohol Effect. (H.Tr. 215-216, 272-273).

II. Petitioner's trial attorneys were both experienced in criminal defense work and thoroughly prepared the case in defense of capital murder.

Terry Williams was represented at trial and on direct appeal by E. L. Motley and Robert J. Smitherman. Motley was appointed to represent Williams in July, 1986. Motley previously had tried two capital murder cases, and numerous serious felony cases. As part of his preparation of trial, Motley reviewed his file from the Johnny Watkins

capital murder case. (H.Tr. 48-50). Ten days after his appointment, Motley filed a motion for appointment of co-counsel. (App. 9, 13).[2] Co-counsel, Mr. Smitherman, was appointed on August 29, 1986. (App. 27).

Motley filed numerous motions with the Court, including a motion for discovery (App. 14), a motion for independent medical examination (App. 23), and a motion for an investigator. (H.Tr. at 69).

Motley also investigated the crime in depth. He investigated the issues of whether the victim had died of alcohol poisoning, had fallen and injured himself, or whether there was any other viable alternative to murder. Despite his efforts, Motley found no credible evidence or credible witnesses to support any of those theories. (H.Tr. 72-74).

Smitherman, a 1984 graduate of the William and Mary Law School, was appointed to assist Motley. Smitherman previously had been Court appointed counsel on felony cases. (H.Tr. 126, 129). Smitherman researched the area of capital murder jurisprudence in Virginia, and spoke often with Motley. (H.Tr. 130).

Smitherman interviewed numerous fact witnesses, as well as the medical examiner. (H.Tr. 135). Smitherman interviewed certain individuals who had information that the victim may have had a previous injury. All of these witnesses had credibility problems, however, and the tactical decision was made that it was best not to use them. (H.Tr. 138-139).

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[2] Appendix references are to the appendix on direct appeal.

III. Motley and Smitherman provided Williams with effective and professional representation.[3]

A. E. L. Motley suffered from no mental impairment during the course of his representation of Williams.

1. *Williams was re-presented by competent and professional counsel.*

As discussed earlier, the Court finds that E. L. Motley was suffering from no mental impairment during the course of his representation of Williams. Having observed Mr. Motley at trial, and having considered all of the evidence presented at the evidentiary hearing, including the evidence by live witnesses and by affidavit, as well as all other evidence properly before the Court, the Court is of the opinion that Mr. Motley's depression had no impact on Williams' case. Mr. Motley's problems did not begin to manifest themselves until the late spring or early summer of 1987. (H.Tr.22) And, even when they did manifest themselves, Mr. Motley's problems were concentrated in the area of civil matters, such as his handling of trust accounts. Mr. Motley was able to handle criminal matters without difficulty. (H.Tr.47-48).

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[3] For the sake of convenience, the enumeration of these findings mirrors the allegations lodged against counsel in Allegation VII of the amended petition as closely as possible. In some instances, however, issues have been sub-divided for convenience.

2. *The fees paid to counsel had no adverse effect on their performance.*

The petitioner has alleged the fees paid to counsel affected the performance of counsel in their representation of Williams. Mr. Motley received compensation in the amount of $1,960. Mr. Smitherman received compensation in the amount of $1,400. (See Exhibit 10). Williams has failed to show any nexus between the fees afforded counsel and their performance in his representation. After reviewing the record of trial, as well as the entire record of the plenary hearing, this Court finds that the fees paid to Williams' counsel had no bearing whatsoever on their performance during the course of their representation of Williams.

3. *The procedural default rules of Slayton v. Parrigan, and Hawks v. Cox, have been appropriately applied.*

Williams argues that the procedural default of *Slayton* and *Hawks*, which have been applied to dismiss certain claims in this action,[4] should not have been applied because they were done so "at a time that it was not known that the lead counsel was suffering from mental impairment . . . " As discussed previously, this Court has determined that lead counsel was under no mental disability of impairment during the time of his representation of Williams. And, there is absolutely no indication in the record that Mr. Smitherman, co-counsel in this case, was suffering under any mental impairment. Given these

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[4] These claims have been noted previously.

facts, this Court finds no reason to reconsider its earlier rulings with respect to the *Slayton* and *Hawks* rules.

B. Counsel's performance throughout the proceedings was both professional and competent.

As previously discussed, this Court has concluded that counsel, E. L. Motley, was suffering from no disability during the course of this representation of Williams. Moreover, Williams has introduced no evidence whatsoever that co-counsel, Robert J. Smitherman, was ineffective during the course of his representation of Williams.

C. The performance of counsel at the guilt phase of the trial was both professional and competent.

1. *Petitioner was competent.*

The record indicates that Williams previously was found competent to stand trial. Specifically, Williams was found "competent to plead and to stand trial in that he does not lack substantial capacity to understand the proceedings against him or to assist in his own defense". (App.17). Moreover, Williams had a "good understanding" of the [sic] "the roles and functions of the various participants in courtroom procedures, the various pleas and their consequences, and related court issues. . . . " *(Id.)* Counsel was justified in relying on this information.

Moreover, no evidence has been presented to show that Williams was suffering from any mental incompetency. A sleep-deprived EEG was performed on Williams, with normal results, (H.Tr. at 234). The results of Williams' neurological tests were normal. Williams' skull film was normal. (H.Tr.237). While there is an indication that Williams had contracted syphilis, the evidence reveals that he was appropriately treated for that disease. (H.Tr.at 241). In any event, Williams has presented no evidence of a nexus between his syphilis and the trial of this case. As has been previously mentioned by this Court, it has not been proven that Williams suffered from Fetal Alcohol Syndrome.

2. *Counsel fully and adequately investigated the issues of robbery and cause of death.*

Counsel interviewed numerous witnesses who allegedly had information that the victim may have had a previous injury. All of the witnesses had significant "negatives". (H.Tr.139). Based on the foregoing, counsel made the tactical decision that it was best not to call these individuals. (H.Tr. 101-102, 138-139).

Moreover, the confession given by Williams *prior* to the autopsy being performed, "dovetailed" with the autopsy report. (H.Tr.101-102). In Williams' confession of April 25, 1986, he stated that the victim was "really drunk" and that he, "sort of passed out . . . " Williams states that he went into the bathroom and "got the mattock that was behind the clothes and . . . I struck him with the mattock in this chest." Williams stated that the victim then "gazed up and turned over, I hit him again in the

back with it. From there, I went into his pocket and took his wallet, it was $3.00 in his wallet. I took the $3.00 and left. I went right across the bridge, I took the $3.00 out the wallet and throwed the wallet over the bridge . . . " (App. 776). In his typed statement of the same date, Williams states that he went into the bathroom and saw the mattock. He picked up the mattock and hit the victim "on the chest with it. He raised up and was gasping for his breath. He fell over to his side and I hit him in the back with the maddax (sic). He felt back on his (sic) bed." Williams went on to state, "I took his wallet from his pocket." (App. 779).

The petitioner has produced no evidence to dispute the facts surrounding the cause of death which were found at trial and on appeal. (App. 272). Dr. David Oxley, the Medical Examiner who performed the autopsy on the victim, did not receive the victim's body until July 1, 1986. The body had been exhumed. (App. 267). When the body was opened, there were fractures on the fourth and fifth ribs on the left near the breastbone, in the area of the chest. There was hemorrhage in the muscle and soft tissue around the ribs. (App. 268). The fractured ribs had punctured the left lung. The ribs also caused bleeding into the chest cavity on the left side. (App. 269). Dr. Oxley determined that the rib displacement was caused by a "fairly heavy blow". Dr. Oxley determined that the injury occurred while the victim was alive. (App. 270) Dr. Oxley determined that the cause of death was "blunt force injury to the chest with hemothorax, that's bleeding into the chest cavity". (App. 272).

Counsel for petitioner in this case were faced with a confession by the petitioner which supplied all the details

of the murder and the robbery. Speculative questioning of certain witnesses in this case would have only widened the credibility gap of counsel and the petitioner in his defense.

The court also finds that counsel conducted an adequate investigation into the robbery. Counsel interviewed witnesses, including members of the victim's family and individuals who found the body. The issue was argued both at trial and on appeal. *See Williams*, 234 Va. at 175, 360 S.E.2nd at 365. (H.Tr. 151-153). Moreover, Williams had offered nothing more than speculation on this issue, and the robbery was entirely consistent with Williams' confession.

On the issue of guilt or innocence, the Court finds that given the evidence in this case, counsel conducted a reasonable and thorough investigation.

3. *Counsel was justified in relying on Dr. Oxley's conclusion.*

The Court finds that the cause of death of Harris Thomas Stone, the victim in this case, was a blunt force injury to the chest with hemothorax, that is, bleeding into the chest cavity. (App. 272). Stone's ribs were broken and displaced sufficiently to lacerate his lung. This is in contrast to what is commonly called a "cracked rib," where there is no displacement. The Court finds that the injury occurred while Stone was alive. (App. 269-270). The Court finds further that alcohol, at a level of .41%, "is a rather severe respiratory depressant". The alcohol in Stone's system accelerated his death. (App. 271-272).

To the extent that there is a disagreement between the findings of Dr. Oxley at trial, and the evidence presented by Williams, this Court finds that Dr. Oxley's testimony at trial is more persuasive. And, the Court finds that Dr. Oxley's testimony at the evidentiary hearing that it was "possible" that Stone's injuries could have been caused by a fall, is speculative, at best, and is insignificant when viewed in light of all of this case. (H.Tr. 199-121). Further, the petitioner himself, through his confessions had already related how the homicide occurred and what he did to bring on Mr. Stone's death. The Court finds that Stone's death was a homicide, and that it was entirely consistent with the information given by Williams in his confession. (H.Tr. at 123).

4. *As stated earlier, the Court is not convinced that Terry Williams suffers from Fetal Alcohol Syndrome.*

The evidence on this issue is extensive, but not persuasive.

The evidence does not clearly establish that Williams suffers from Fetal Alcohol Syndrome. As stated earlier, the Court does not know if Williams suffers from Fetal Alcohol, but moreover, and more importantly, the Court finds that it is *not* likely that laymen, such as Mr. Motley or Mr. Smitherman, would have been aware of Fetal Alcohol Syndrome in 1986. While Dr. Ryans, a forensic psychiatrist, was familiar with Fetal Alcohol Syndrome in

1986,[5] Dr. Arthur Centor, a psychologist, knew nothing of Fetal Alcohol Syndrome in 1986. (H.Tr.at 316). Given that a well-respected mental health professional was not familiar with Fetal Alcohol Syndrome in 1986, it is unreasonable to expect laymen, such as Mr. Motley or Mr. Smitherman, to have been familiar with Fetal Alcohol Syndrome during that time period. As it is unreasonable to expect these attorneys to be familiar with Fetal Alcohol Syndrome, they were not ineffective for their failure to investigate whether Williams suffered from Fetal Alcohol Syndrome.

5. *Counsel's conduct with regard to the confession and suppression hearing was competent and professional.*

The Court has previously found that Williams was mentally competent. Thus, counsel had no reason to continue to challenge this point. (H.Tr. at 51-52). The majority of the circumstances surrounding the confession have been considered, both by this Court at trial and by the Supreme Court of Virginia on appeal. This Court finds, that counsel made a reasonable and professional effort to suppress Williams' confession. The fact that Williams was the first individual interviewed regarding the anonymous letter is of no consequence. Williams was interviewed initially because the police believed that the letter may have referred to another crime that was under investigation.

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[5] Dr. Ryans determined that Williams does not suffer from Fetal Alcohol Syndrome.

The interview of Williams was not coercive, and the fact that Williams stated that he was seeking "help . . . falls far short of a confession induced by the hope of gaining some advantage or avoidance of some evil in reference to the proceeding against the defendant." *Williams* v. *Commonwealth*, 234 Va. 168, 174, 360, S.E.2d 361, 365 (1987), *cert. denied*, 484 U.S. 1020 (1988). Moreover, Williams alleges that the police attempted to coach him during the course of his confession. This Court has considered this allegation before, and has rejected it. This Court, again, rejects this testimony, and finds that Williams was not coached. Williams also alleges that counsel failed to note discrepancies within the confessions. To the contrary, this Court notes that the alleged discrepancies were also considered by the Supreme Court of Virginia on direct appeal. *See Williams*, 234 Va. at 174-175, 360 S.E.2nd at 365. Williams maintains that counsel should have requested the assistance of an expert on *false confessions*. Such a motion would have been futile, however, as this Court is aware of no authority, and Williams has cited none, which would have entitled him to such an expert.

Williams alleges that counsel was ineffective for failing to object to the use of Dr. Mansheim during the suppression hearing. First, as Williams has failed to state with specificity what testimony it is that he finds objectionable, this Court has deemed this allegation to be waived. Second, the Court does not find that Dr. Mansheim's testimony was objectionable. There is no reason why Mansheim could not have been called as a witness for the Commonwealth. *See* § 19.2-264.3:1(D), Code of Virginia (dealing with expert testimony during the penalty phase of trial). Finally, the Court finds no prejudice

in the Commonwealth's use of Dr. Mansheim during the suppression hearing.

Williams next alleges that counsel was ineffective for failing to object to his interrogation in the absence of counsel. First, in 1986, Williams was represented by counsel on a wholly-unrelated charge. Second, this Court finds that Williams initiated contact with the police by means of his letter.

Williams next alleges that counsel failed to seek the disqualification of the Commonwealth's Attorney, and that counsel failed to object to the Commonwealth's Attorney's *testimony*. The Court finds no reason why the commonwealth's Attorney, William H. Fuller, III, should have been disqualified at trial. It is "not desirable for the Commonwealth's Attorney to testify as a witness on a material point in a case". *Bennett* v. *Commonwealth*, 236 Va. 448, 464, 374 S.E.2d 303, 313 (1988) Although the Commonwealth's Attorney was present during the questioning of Williams, he did not take an active role in the questioning. Moreover, other witnesses were available that were present during questioning, and who took a role in the questioning, that were more suitable to be called at trial. Finally, this Court finds that the questioning of Williams by the Commonwealth's Attorney at the suppression hearing was appropriate and proper cross-examination.

6. *No evidence that counsel did not advise Williams of his options.*

Williams has presented no evidence that counsel failed to advise him about this possible pleas and

defenses. Indeed, Williams indicated that he was pleased with counsels' performance, even after he had been convicted of capital murder. (App. 727) The Court finds no merit to this allegation.

D. Counsel's performance at the sentencing phase of the trial.

1. *Counsel's actions at the sentencing phase are the only real concern of the trial court in this case.*

Williams has made numerous allegations against Motley and Smitherman for failing to present mitigation evidence. Among these allegations are that Williams was neglected and mistreated as a child, that his parents drank, and fought often, and that he was beaten by his father. Counsel's investigation into these matters, in light of the stage of the proceeding, was lacking.

For example, the petitioner's juvenile records from Beaumont Correctional Center reveal a report which described conditions in the Williams household. (See Petitioner's Exhibit #8) . (Tr. 334-335; 343-348; and also Petitioner's Exhibits #30-33). This report contained information that counsel should have investigated thoroughly in an effort to ascertain what might be relevant and significant as to the contents contained therein so this evidence could be presented as mitigating evidence at the sentencing phase.

Evidence of a mitigating nature was also available through petitioner's wife and ten year old daughter.

While cross-examination might be costly, in balance, Williams' daughter visited her father often and she and her mother considered him a good and loving father. (See Petitioner's Exhibit #28).

Probably the most persuasive mitigating evidence which was not tendered to the jury involved the failure to interview and call Bruce Elliott as a witness during the sentencing phase. Prior to trial, this witness called counsel and offered his help, but counsel never followed up by talking to the witness. Mr. Elliott, a certified public accountant and partner in a Harrisonburg, Virginia accounting firm would have testified that he had known Terry Williams since 1978. His testimony would have portrayed petitioner as a decent human being who struggled to prove his worth in spite of his being somewhat disadvantaged mentally, emotionally and financially. His affidavit also states he would have testified that Williams took pride in his achievements, such as his graduation from carpentry school at the Martinsville Correctional Facility. (See Petitioner's Exhibit #26). This testimony from a well-educated professional would have had an impact on the jury on the question of future dangerousness, and could have tilted a juror to favor a life sentence.

It is obvious that counsel made a tactical decision to focus attention at the penalty phase on Williams' confession, the object being to convince the jury that Williams' life should be spared due to the fact that he had given an unsolicited confession to the police. (H.Tr. 981; see generally App. 732-750).

Counsel made a tactical decision not to put certain witnesses before the jury to prevent the Commonwealth

from reminding the jury of the "horrible and terrible crimes that Mr. Williams had done," (H.Tr. 157), but it is troubling to this Court that favorable evidence was not pursued and introduced for "whatever it was worth" when the decision which was to be made by a jury involved *life or death*. The question becomes: Were counsel's actions reasonable in this area? With so little favorable testimony in the way of mitigation and faced with much unfavorable evidence on the question of future dangerousness, this information could have been critical in the jury's decision as to Williams' punishment.

2. *The testimony of Drs. Centor and Ryans was proper.*

Williams contends that counsel was ineffective for failing to object to the testimony of Drs. Centor and Ryans. Dr. Centor was appointed by the Court to examine Williams pursuant to Virginia law, upon a representation by Mr. Motley that Williams "may lack substantial capacity to understand the proceedings against him or to assist his attorney in his own defense". (App. 10). An order was entered by this Court on July 10, 1986, appointing Dr. Centor to submit a full report and summary of this conclusions [sic] to the Court in accordance with Virginia Code §§ 19.2-169.1(d), 19.2-169.5(d) and 19.2-264.3:1(c). (App. 10-12). Dr. Centor filed an appropriate report with this Court on August 13, 1986. (App. 17-18). That report indicated that it dealt solely with Williams' competency

to plead, and that a full report on the main issues was being forwarded to Mr. Motley. *Id.*[6]

While this Court appointed Dr. Centor to perform this evaluation, this Court finds that in order for a full and proper report to be prepared, other health care professionals would be obliged to contribute to the examination. While Dr. Ryans was not specifically appointed by this Court, this Court recognizes that Dr. Ryans was on the evaluation team at Central State Hospital in Petersburg. Other individuals on this team also were necessary to complete the proper examination of Williams. (H.Tr. at 230-231). As Dr. Ryans obviously was a part of Dr. Centor's team at Central State Hospital (See App. 11), it was entirely appropriate, under this Court's order, for Dr. Ryans to examine Williams in conjunction with Dr. Centor's evaluation.

Both Dr. Ryans and Dr. Centor testified at the hearing to suppress Williams' confession. Although Williams alleges that this testimony was improper and that counsel was ineffective for failing to object to it, Williams has failed to point to that testimony which he alleges was improper. This Court has found none.

Dr. Ryans and Dr. Centor also testified at the penalty phase of the trial. Both witnesses testified that, based on Williams' criminal history, he constituted a future danger. (App. 677-678, 690-692). Moreover, the Court finds no

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[6] It is readily apparent, and the Court so finds, that based on the order filed by the Court and by Dr. Centor's response, that any reference to "aggravation" in this Court's order was mere excess verbiage.

evidence that Dr. Centor's report, produced under the provisions of Virginia Code §§ 19.2-169.5 and 19.2-264.3:1(D), was improperly forwarded to the Commonwealth. To the contrary, Dr. Centor indicated that his report, prepared under these sections, was forwarded only to Mr. Motley. (App. 17-18).

It is obvious to this Court that, while Dr. Centor originally believed that there was a "low probability that [Williams] would commit criminal acts Of violence" in the future (H.Tr. 305), he changed his opinion when he learned of Williams' full criminal record. (App. 690-692; H.Tr.309).[7]

This Court also finds that, despite their best efforts, defense counsel was unable to develop any mental health evidence in mitigation. Mr. Motley testified at the hearing that his search for even "a sliver of psychiatric evidence

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[7] Centor did not read Williams his *Miranda* rights. He did, however, advise Williams that the contents of the interview could be discussed if Williams was convicted of capital murder and one of the examiners was called to testify during the sentencing phase of the trial. (H.Tr.303-304). This Court finds, however, that *Miranda* warnings were not required in this case. The competency evaluation was requested by Mr. Motley. Thus, Williams was not compelled by the Court to submit to the examination. *See Payne* v. *Commonwealth*, 233 Va. 460, 470-471, 357 S.E.2d 500, 506 (1987), *cert. denied*, 108 S.Ct. 308 (1987). Moreover, both Ryans and Centor indicated that their opinion on future dangerousness was based on Williams' prior conviction record. It was not based on, and the witnesses did not rely on, any statement made to them by Williams. *See Stewart* v. *Commonwealth*, 245 Va. 222, 224, 427 S.E.2d 394, 408, *cert. denied*, 114 S.Ct 143 (1993).

that would help" turned up nothing. (H.Tr.99). Dr. Mansheim, who had been appointed the defense expert, could not have testified that Williams would not be a danger in the future. Based on these facts, the Court concludes that counsel pursued the reasonable trial strategy of not placing Mansheim on the witness stand where he would be subject to cross-examination on the issue of future dangerousness. (H.Tr.99).

Counsel pursued a reasonable trial strategy in not cross-examining Drs. Centor and Ryans on their previous report. The previous report stated that petitioner did not constitute a future danger. It is obvious that, had counsel sought to cross-examine these experts on their initial report, the Commonwealth would have pointed out on redirect that the initial report was completed before the experts were aware of Williams' criminal history, giving the Commonwealth the opportunity to recount that history yet again.

In any event, this Court finds that the evidence of Williams' prior criminal activity alone was more than sufficient to support a finding of future dangerousness. Williams previously had been convicted of armed robbery (App. 783), burglary and grand larceny (App. 786), and malicious wounding (App. 801). Williams also had been convicted, through [sic] not sentenced, on two indictment [sic] of grand larceny of an automobile and for arson. (App. 808-811). Based on the foregoing, the Court concludes that the evidence was sufficient to show that Williams was a future danger, without the testimony of the mental health experts.

3. *Dr. Mansheim's testimony was proper.*

Counsel requested that this Court order an independent examination to determine (1) whether the defendant was competent to stand trial, and (2) the defendant's mental capacity at the time of the offenses. The defendant made this motion in accordance with *Ake* v. *Oklahoma*. (App. 23). This Court ordered that Dr. Paul A. Mansheim perform said evaluation, pursuant to Virginia Code §§ 19.2-169.1, 19.2-169.5, and 19.2-264.3:1. (App. 25-27).

While it is not disputed that Dr. Mansheim filed his report with this Court, with a copy to the Commonwealth (see App. 33-36), there is no indication in this record that Dr. Mansheim did not continue to serve as a defense expert. Dr. Mansheim's testimony for the Commonwealth at the suppression hearing consisted entirely of his finding on Williams' competency, and was merely cumulative of the testimony of Ryans and Centor. (See App. 425-433).

Most importantly, despite the fact that Dr. Mansheim's report was disseminated, it contained no information which could have been considered prejudicial to Williams'. This Court finds that Williams was not prejudiced by the dissemination of Dr. Mansheim's report[8]. For the most part, Dr. Mansheim's report, like his testimony, was merely cumulative of the findings of Drs. Centor and Ryans. Williams was aware of the charges that he was facing and was aware that he previously had been seen

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[8] It is the report, and not access to the expert, that is protected by Virginia law. *See* Va. Code §§ 19.2-169.5 and 19.2-264.3:1.

by a psychologist. The report included a short biographical sketch of Williams. The report also discussed the charges Williams was facing, as well as his dreams. In short, the report stated that Williams was competent to stand trial and that he was not insane at the time of the offense. The only mitigating factor contained in the report was that, during the armed robbery in 1986, Williams took the bullets out of his gun so that no one would be injured. (App. 33-36). This Court concludes, therefore, that there was nothing in the report warranting an objection from counsel.

This Court finds that counsel communicated with Dr. Mansheim, to the extent that Mansheim had information that would be helpful to the defense. Counsel stated at the hearing that "Dr. Mansheim really didn't have anything much that could help us. I remember Mr. Smitherman and I talked at length with him, I mean right on up to the testimony in the penalty phase hearing. But I don't think Dr. Mansheim had anything really that we could draw on much to help". (H.Tr. 99). Counsel went on to state that Mansheim could not testify that Williams would not be a danger in the future, and that he "probably would have testified that Terry was likely to exhibit violent crimes in the future". (H.Tr. 99). As to the letter that Dr. Mansheim received from Mr. Fuller, Mansheim could state at the hearing that he could only "assume" that the letter made "some impression" upon him. (H.Tr. 202)

Based on the foregoing, this Court finds that Williams was not prejudiced by the dissemination of Dr. Mansheim's report, that counsel acted appropriately with

relation to this report, and that Williams was not prejudiced by Dr. Mansheim's receipt of "raw data" from the Commonwealth.

4. *Investigation of the Solomon incident.*

Williams has failed to present any credible evidence that counsel was ineffective regarding the Solomon matter.

E. Counsel's closing arguments were appropriate.

Williams alleges that counsel was ineffective in his closing arguments for failure to argue a lack of premeditation in the guilt phase and for emphasizing Williams' crimes at the penalty phase. This Court finds that, under the circumstances, counsel's arguments were entirely appropriate.

This Court finds that counsel followed a reasonable strategy of attacking the physical evidence, as well as those elements which would elevate the crime to capital murder. Specifically, counsel pointed out that the murder weapon had not been found, and argued that the injuries suffered by the victim could not have been caused by a mattock. Counsel also pointed to inconsistencies in Williams' various statements. Counsel challenged the evidence on robbery, and pointed out alternative ways in which the victim's wallet could have disappeared. Moreover, this Court finds that counsel did argue a lack of premeditation.

At the penalty phase of the trial, counsel followed a strategy of asking the jury to spare his client's life despite the crimes that he had committed. He argued that Williams had a heart and that he had a conscience. Counsel emphasized to the jury that it was Williams who surrendered himself to the police, and confessed to his crimes. Counsel argued, quite reasonably, that people who admit their wrongs should receive favorable consideration. The jury already was well aware of the crimes that Williams has committed, and the nature of those crimes. Counsel followed a reasonable strategy in confronting those circumstances up front and then arguing for a life sentence, based on the fact that Williams had confessed to his crimes. Under the circumstances of this case, this Court finds that counsel's arguments at both phases of the trial were within the range of effective performance.

F. The jury was properly instructed.

Williams alleges that counsel was ineffective for failing to request jury instructions on mitigation, aggravation and premeditation. Williams also alleges that counsel failed to request a jury instruction explaining the concept of killing during the course of a robbery, and that he failed to proffer instructions relating to parole in Virginia.

First, this Court finds that Williams has failed to proffer any instructions to this Court. In failing to do so, this Court finds that there is a failure of proof on this allegation, and it accordingly fails.

In any event, the Court finds that the jury was properly instructed. It is improper in Virginia to single out any portion of the evidence, including mitigation or

aggravation. *See Jones v. Murray*, 947 F.2d 1106 (4th Cir. 1991) (Virginia's penalty phase instructions are constitutionally adequate to explain the concept of mitigation) . Next, this Court's instruction on the issue of premeditation was proper. (See Instruction No. 7, App. 836). Williams' statement that an individual must have formed the specific intent to rob the victim prior to the murder to be found guilty of capital murder is an incorrect statement of Virginia law. The theft may occur during or after the murder so long as the evidence supports the conclusion that the killing and the theft were interdependent objects of a common criminal design. *See*, e.g., *Wise. v. Commonwealth*, 230 Va. 322, 334, 337 S.E.2d 715, 733 (1985), *cert. denied*, 475 U.S. 1112 (1986). Finally, the possibility of parole or parole eligibility is inadmissible. *See, e.g., Poyner v. Commonwealth*, 229 Va. 401, 432, 329 S.E.2d 815, 836, *cert. denied*, 474 U.S. 865 and 474 U.S. 888 (1988). Thus, as the jury was properly instructed, counsel could not have been ineffective.

G. Failure to raise objections.

Williams alleges that counsel was ineffective for failing to raise numerous objections, including witness testimony pertaining to the Stroud trial, Williams' confession, the court requiring the jury to stay late, psychiatric testimony introduced by the Commonwealth, evidence regarding Williams' prior convictions, the Commonwealth's abuse of discretion in prosecuting Williams for capital murder, and improper argument by the Commonwealth.

The Court points out first that these allegations are entirely conclusory and are, thus, insufficient. *See Penn v. Smyth*, 188 Va. 367, 49 S.E.2nd 600 (1948). Moreover, the Court already has made findings relative to many of these allegations.

In any event, the Court finds that counsel's actions with regard to these issues was entirely proper. First, as the Supreme Court of Virginia stated on the direct appeal of this case, Virginia Code § 19.2-264.4(B) authorizes "the introduction of the details of other criminal conduct". *Williams*, 234 Va. at 182-183, 360 S.E.2d at 370, citing *Edmonds v. Commonwealth*, 229 Va. 303, 329 S.E.2d 807, *cert. denied*, 474 U.S. 975 (1985). As the underlying substantive issue in this ineffective counsel claim has previously been decided against Williams, this Court concludes that counsel's performance was entirely proper.

Williams' alleges that counsel failed to object to the introduction of his confession on the grounds that he previously had invoked his right to counsel. As previously discussed, this Court finds that counsel made a reasonable and professional effort to suppress Williams' confession. This Court has found that, at the time Williams confessed in 1986, he was represented by counsel on a wholly unrelated matter. Second, this Court has also found that Williams initiated contact with the police by means of his letter. This Court sees no reason to disturb these findings. *See Williams*, 234 Va. at 172-173, 360 S.E.2d at 364. This Court also notes that counsel challenged both the admissibility of Williams' confession and the weight that should have been afforded it, at trial and on direct appeal. *Id.* at 172-175, 360 S.E.2d at 364-365. Given these

facts, this Court finds that counsel acted professionally and appropriately with respect to Williams' confession.

Williams' argument that counsel failed to object to the Court requiring the jury to stay late into the evening fails to state a claim. Moreover, there is no indication in the record that the jury was, as Williams claims, "tired and anxious to go home". (Amended Pet. at ¶ 331). The jury was instructed, and retired to the jury room at 9:57 p.m. At 11:03 p.m., the jury returned its verdict. (App. 767). There is no indication in the record that the jury had any difficulty reaching its verdict or that they desired to retire for the evening and return the next day to continue deliberations. And, given the overwhelming aggravating evidence in this case, a deliberation of more than one hour does not indicate that the jury was "anxious to go home". Given these facts, this Court finds that counsel acted properly. Moreover, Williams has produced no evidence to indicate that he was prejudiced.

Williams next alleges that counsel was ineffective for failing to object to the introduction of psychiatric and other expert testimony on future dangerousness by the Commonwealth. This allegation previously has been addressed, and this Court finds no reason to reconsider these findings. Specifically, this Court finds that Dr. Cantor and Dr. Ryans properly testified for the Commonwealth during the penalty phase of the trial. First, it is the report produced by the mental health expert that is protected by Virginia Code § 19.2-264.3:1. This Code section does not prevent a representative from the Commonwealth from contacting the mental health expert and interviewing him as he would any other witness. Second, it is clear from their testimony at trial that Dr. Ryans and

Dr. Cantor reached their conclusions on future dangerousness based upon Williams, criminal record, and not upon statements that Williams had made to them. (App. 677-678, 690-692). Moreover, the testimony of Drs. Cantor and Ryans, as well as the testimony of Dr. Mansheim at the suppression hearing, dealt with Williams' competency, an issue which is not protected under the statute. In any event, as stated previously, given the facts of this case, this Court finds no prejudice.

Williams' allegation that the use of prior convictions during the sentencing phase of trial violated the double jeopardy clause has no merit. As the Supreme Court of Virginia has found many times, the capital murder statutes allow the jury to use evidence of prior convictions to impose the sentence of death, and this does not violate the defendant's protection against double jeopardy. *See, e.g., Joseph v. Commonwealth*, 249 Va. 78, 82, 452 S.E.2d 862, 865 (1995).

Williams next claims that counsel was ineffective in failing to object to the Commonwealth's abuse of discretion in pursuing capital murder. This claim is conclusory, and there is no evidence to support it. It therefore fails for lack of any evidence.

In any event, this Court finds that a prosecutor has broad discretion in determining whether to prosecute for capital murder, *see, e.g., Gray v. Commonwealth*, 233 Va. 313, 356 S.E.2d 157, *cert. denied*, 484 U.S. 873 (1987), and that the Commonwealth's Attorney did not abuse that discretion. Counsel was correct in not objecting on this basis.

Finally, Williams asserts that counsel was ineffective for failing to object to improper argument by the Commonwealth's Attorney. This Court finds no merit to Williams' assertions. Moreover, to the extent that the underlying substantive claim was considered by the Supreme Court of Virginia on direct appeal, that issue has been decided, and counsel's failure to object is not prejudicial. *See Williams*, 234 Va. at 180-181, 360 S.E.2d at 368 369, (considering the penalty phase argument against the background of the entire case, "we find no prejudicial error in the trial court's failure to sustain the objection to the argument of the Commonwealth".)

As to the remainder of the Commonwealth's arguments, at both the guilt and penalty phases of the trial, this Court finds nothing improper in the Commonwealth's argument. In an attempt to show that the Commonwealth engaged in "misleading arguments", Williams has, himself, misrepresented the record. During his closing argument, the Commonwealth's Attorney stated that, "Jinnadean Stone testified that [the victim] did not have any heart problem. He had high blood pressure, but he didn't have any heart problem, he didn't have any chest pains". (App. 504-505). The Commonwealth's Attorney obviously was referring to the testimony of the victim's daughter wherein she testified that her father had high blood pressure four or five years ago, but had no chest pains or heart trouble. (App. 285-286).

The Commonwealth Attorney's reference during his opening statement that Williams "thought about getting a knife" was prefaced by the phrase, "we think the evidence will indicate . . . " (App. 161). Moreover, this was a fair representation of the statement made by Williams in

his confession. The Court finds, that the Commonwealth's Attorney's argument on remorse, and his reference to the testimony of Dr. Mansheim, were entirely proper. Finally, this Court finds that the remainder of the Commonwealth's argument was proper.

In any event, this Court can find no indication of actual prejudice stemming from any of these arguments in the record. Williams had pointed to none. Given these facts, the Court concludes that the argument of the Commonwealth's Attorney was proper and, in any event, Williams failed to show, based on this record, any prejudice.

H. Counsel was not ineffective during voir dire.

Williams alleges that his trial attorneys were ineffective in failing to conduct meaningful voir dire. Williams has failed to demonstrate, however, either how the voir dire was inadequate, or how he was prejudiced. This Court finds, first, that decisions made on voir dire are matters within the discretion and judgment of counsel, and are virtually are [sic] unchallengeable on habeas. Moreover, this Court finds that the jury was impartial, and Williams has failed to rebut that presumption. On these facts, the Court finds no merit to Williams' allegations.

I. Counsel was competent on appeal.

Williams contends that trial counsel failed to appeal the Commonwealth's introduction of psychiatric testimony on future dangerousness, the prosecution's

misconduct with regard to communication with and the introduction of testimony of psychiatric experts and the failure of the Court to provide sufficient money and resources to petitioner at the trial stage. This Court finds that the petitioner has failed to present any facts showing that counsel was ineffective in this regard. Counsel is not required to raise every issue on appeal. Indeed, counsel has the responsibility of "winnowing out weaker arguments on appeal and focusing on the one central issue if possible, or at most on a few key issues". *Jones v. Barnes*, 463 U.S. 745, 751, (1983). This Court finds that counsel exercised professional judgment in choosing the issues upon which to appeal. Moreover, Williams has demonstrated no prejudice as a result of counsel's failure to appeal any of the issues listed above.

Finally, to the extent that Williams alleges that counsel was ineffective on appeal of the Stroud case, that claim is not cognizable in this action.

J. Ineffective assistance claims related to the Stroud and Soloman cases.

Williams alleges that counsel was ineffective on the Stroud and Solomon cases. This Court finds that Williams has presented no credible evidence that counsel's performance in these cases was deficient. Moreover, he has presented no proof on the issue of prejudice. Accordingly, the Court finds that Williams has failed to carry his burden.

RECOMMENDED CONCLUSIONS OF LAW

I. Standard on Ineffective Assistance Claims

There can be no relief for ineffective assistance of counsel unless the petitioner shows that counsel's performance was so deficient that he was not functioning as the "counsel" guaranteed by the Sixth Amendment, and petitioner shows prejudice in that there is a reasonable probability that but for counsel's unprofessional errors, the result would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984) . Unless a petitioner shows ineffectiveness and prejudice, it cannot be said that a conviction resulted from a breakdown in the adversary process that renders the result unreliable. *Id.* at 692-697. The Courts of the Commonwealth follow the *Strickland* standard. *See Virginia Department of Corrections v. Clark*, 227 Va. 525, 318 S.E.2d 399 (1984).

Petitioner has the burden of showing that counsel's performance was deficient in "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed" by the Sixth Amendment. *Strickland*, 466 U.S. 687. This is a "reasonably effective assistance test." *Id.* In considering a claim of ineffective assistance, this Court need consider only what is constitutionally compelled, and not that which is merely prudent or appropriate. *Burger v. Kemp*, 483 U.S. 776, 794 (1984). Strategic choices made after a thorough investigation of the law and the facts, are virtually unchallengeable. *Strickland*, 466 U.S. at 690. And, a petitioner bears the burden of specifically identifying the acts or omissions of counsel that allegedly constituted ineffectiveness. *Id.*

Even if a Petitioner shows that counsel's performance was deficient, however, he must also show prejudice. Petitioner must show "that there is a reasonable probability that but for counsel's unprofessional errors, the result . . . would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Indeed, it is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. *Id.* at 693. The petitioner bears the 'highly demanding" and "heavy burden" in establishing actual prejudice. *Department of Corrections v. Jones*, 229 Va. 333, 329 S.E.2d 33 (1985).

This Court indulges in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. A claim of ineffective assistance must be proved by a preponderance of the evidence, *see Stokes v. Warden*, 226 Va. 111, 306 S.E.2d 882 (1983), and the burden of establishing ineffective assistance is upon the petitioner. *See Strickland*, 466 U.S. at 668. Moreover, this Court need not address both prongs if either fails. *Strickland*, 466 U.S. at 697.

II. Terry Williams was provided with effective and professional representation.

A. E. L. Motley suffered from no mental impairment during the course of his representation of Williams.

This Court has specifically found that E. L. Motley was under no mental impairment during the course of his

representation of petitioner. Counsel's performance was, indeed during all stages of the guilt phase "reasonably effective" under *Strickland,* and moreover, the petitioner has failed to show actual prejudice with regard to any of his ineffective assistance claims relating to guilt or innocence. As to petitioner's claim that the fees paid to counsel had an adverse effect on performance, petitioner has shown neither that counsel's performance was ineffective due to his fees, nor any prejudice resulting therefrom. Finally, given the fact that the Court has found that Mr. Motley was suffering from no mental impairment during the time of his representation of petitioner, the Court's rulings with regards to defaulted claims under *Slayton v. Parrigan* and *Hawks v. Cox* shall not be disturbed.

B. Counsel's performance at the guilt phase of the trial was both professional and competent.

1. *Counsel properly explored the mental competency of the petitioner.*

Petitioner was evaluated, first by Drs. Centor and Ryans, and then by Dr. Mansheim. All of these experts came to the conclusion that Williams was competent to plead and stand trial and did not lack the substantial capacity to understand the proceedings against him or to assist in his own defense. There was no evidence that Williams was suffering from any mental incompetency, including Fetal Alcohol Syndrome. Counsel has no affirmative duty to seek a second psychiatric opinion. *See Pruett v. Thompson,* 771 F. Supp. 1428 (E.D. Va. 1991). *See also Turner v. Bass,* 753 F.2d 342 (4 Cir. 1985), *vacated on other grounds, sub nom, Turner v. Murray,* 476 U.S. 28

(1986). Given the fact that three separate mental health professionals had determined that petitioner was competent, counsel was justified in not pursuing that avenue further. *Strickland*. Moreover, petitioner has failed to show that counsel's actions were prejudicial. His claim, therefore, must fail.

2. *Counsel adequately investigated the issues of robbery and cause of death.*

It is apparent from the record that counsel adequately investigated the facts of this case. Counsel interviewed numerous witnesses on the question of whether the victim may have had a previous injury. Based on the fact that all of the witnesses had significant "negatives", counsel made the tactical decision that it was best not to call these individuals at trial. *Strickland v. Washington*. Moreover, the confession given by petitioner prior to the autopsy being performed "dovetailed" with the autopsy report. Petitioner's account of robbing Mr. Stone of his wallet was also consistent with the physical finding at the crime scene. Given these facts, counsel acted reasonably under *Strickland*. Moreover, petitioner has shown no prejudice as a result of counsel's investigation. The best that petitioner has been able to do is to present speculative evidence that the victim may have fallen and injured himself, as well as speculative evidence that the victim may have *misplaced* his wallet. This speculation is insufficient to carry the burden under *Strickland*. For these reasons, petitioner's claim fails.

3. *Counsel was justified in relying on Dr. Oxley's conclusions.*

Petitioner's claim that counsel was ineffective for failing to request the appointment of a pathologist must fail. First, petitioner was not entitled to the services of a pathologist. *See O'Dell v. Commonwealth*, 234 Va. 672, 686, 364 S.E.2nd 491, 499, *cert. denied*, 488 U.S. 871 (1988) (there is no constitutional right to funding for defense forensic experts). Second, given the fact that petitioner's confession was consistent with Dr. Oxley's autopsy findings, there was no reason for counsel to continue to pursue this avenue. *Strickland v. Washington*. Moreover, petitioner has failed to show any prejudice under *Strickland*. Petitioner's claim must, therefore, fail.

4. *Williams' allegation of Fetal Alcohol Syndrome.*

As stated in its findings, this Court has found that it has not been clearly established that petitioner suffers from Fetal Alcohol Syndrome. Moreover, a layman such as Mr. Motley or Mr. Smitherman, would not have been aware of Fetal Alcohol Syndrome in 1986. As stated earlier, counsel was justified in relying on the reports of mental health experts. None of the experts, in 1986, stated anything about Fetal Alcohol Syndrome. Under these circumstances, petitioner has shown neither that counsel was ineffective, nor that he was prejudiced by counsel's actions. *Strickland v. Washington*. His claim must, therefore, fail.

5. *Counsel's conduct with regard to the confession and suppression hearing was competent and professional.*

The interview of petitioner was not coercive and he did not confess in the hopes of gaining some advantage or avoiding some evil in reference to the proceeding against him. *See Williams,* 234 Va. at 174, 360 S.E.2d at 365. This Court previously has rejected petitioner's contention that the police attempted to "coach" him during the course of his confession, and sees no reason to reverse its ruling. Any "discrepancies" within petitioner's confessions goes to the weight of the evidence, and not is [sic] admissibility. Counsel so argued, both at trial and on appeal. *See Williams,* 234 Va. at 174-175, 360 S.E.2d at 365. Petitioner was not entitled to an expert on "false confessions". The testimony of Dr. Mansheim at the suppression hearing posed no constitutional questions, even if his opinion was based on petitioner's statements, because those statements were given during a competency evaluation requested by petitioner. *See Payne v. Commonwealth,* 233 Va. 460, 357 S.E.2d 500, *cert. denied,* 108 S.Ct. 308 (1987).[9] Finally, this Court finds that there is no prejudice in the Commonwealth's use of Dr. Mansheim's testimony during the suppression hearing. *Strickland v. Washington.* Although at the time of his confession petitioner was represented by counsel, the rule in *Edwards v. Arizona,* 451 U.S. 477 (1981), is not implicated here. First, as noted, petitioner was represented by counsel on another matter.

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[9] Code of Va. § 19.2-264.3:1, cited by petitioner, deals with expert testimony during the penalty phase of trial, and is not relevant here.

Second, the Court finds as a matter of law that the petitioner initiated contact with the police by means of his letter. Finally, counsel was not ineffective for failing to seek a disqualification of the Commonwealth's Attorney.

As the underlying substantive claims have no merit, counsel cannot be said to have been ineffective under *Strickland*. Moreover, petitioner has shown no *Strickland* prejudice. His claim, therefore, must fail.

6. *There is no evidence that counsel failed to advise petitioner of his options.*

Williams has failed to present any evidence that counsel failed to advise him about his possible pleas or defenses. Under these circumstances, petitioner has failed to carry his burden in meeting either prong of the *Strickland* test.

C. Counsel's performance at the sentencing phase.

Petitioner has alleged ineffective representation of counsel, from beginning to end of his proceedings, however counsel's conduct and representation during the sentencing phase raises the most difficult issue in this case.

1. *Counsel's handling of mitigation evidence.*

Specifically, little evidence was presented on the issue of mitigation, and there exists evidence that petitioner had a deprived and abused upbringing; that he may have been a neglected and mistreated child; that he

came from an alcoholic family; and that he was borderline mentally retarded. There also exist evidence that Petitioner's conduct had been good in certain structured settings in his life (such as when he was incarcerated) and there were friends, neighbors and family of petitioner who would have testified that he had redeeming qualities. Some of this testimony such as petitioner's wife, daughter and Bruce Elliott, was worthy of a jury's consideration on mitigation. However, none of this testimony was developed and presented at the sentencing phase of the trial.

At a capital murder sentencing, *any* evidence which might be favorable or mitigating can mean the difference between "life or death", mitigating testimony is absolutely crucial and if none is offered, this amounts to prejudice. The fact that it might be subject to cross-examination is far different than leaving out any good evidence which might be accepted by a single juror. Failure to present sympathetic testimony has been deemed to be ineffective assistance of counsel. *Kenley v. Armontrout*, 937 F.2d 1298, (8th Cir. 1991), *cert. denied*, 502 U.S. 964 (1991). In *Kubat v. Thieret*, 867 F.2d 351, it was held to be ineffective counsel not to call a deputy sheriff as a character witness since this probably would have been given weight by at least one member of the jury which is all that is needed.

Trial counsel's failure to investigate and develop the evidence available in this case bothers this court on the question of whether there was reasonable professional assistance of counsel which would (or could) have made a difference in the petitioner's sentence. The ABA standards for Criminal Justice provide that with regard to the

sentencing phase of a capital murder trial, a lawyer cannot rely on broad emotional appeals to the jury, nor can he rely on statements made by his client. Instead, it is necessary to conduct a thorough investigation regarding family relationships, educational background, mental and emotional stability, and the like. *See* ABA Standards for Criminal Justice, Standard 4-4.1, Commentary at 4-55 (2d Ed. 1980).

Counsel's failure to present favorable mitigation evidence which was available upon investigation and development falls below the range expected of reasonable, professional competent assistance of counsel, and because this evidence is so crucial to the outcome of the jury's ultimate decision of life or death, it is prejudicial to a defendant when it is not presented at the sentencing phase. (*see Kubat v. Thieret*, supra.) ("Counsel may not treat the sentencing phase as nothing more than a mere post-script to the trial . . . Indeed, in some cases, this may be the stage of the proceedings in which counsel can do his or her client the most good.")

This Court believes this is the case here – Terry Williams needed anything and everything that might be available as favorable evidence to persuade the jury to save his life. Anything less was not enough. For this reason, this Court would recommend the petitioner be granted a re-hearing on the sentencing phase of this trial.

2. *The testimony of Drs. Centor and Ryans was proper.*

Dr. Centor was appointed to submit a report and summary of his conclusions in accordance with Virginia

Code H 19.2-169.1(D), 19.2-169.5(D) and 19.2-264.3:1C. Dr. Ryans, while not specifically appointed by this Court, was a member of the evaluation team at Central State Hospital. Both Dr. Ryans and Dr. Centor testified for the Commonwealth at the penalty phase of the trial. Both Virginia Code §§ 19.2-169.5 and 19.2-264.3:1 provide that the report of the mental health professional shall be forwarded only to the attorney for the defendant and shall be deemed privilege. It is clear, from the plain language of the statute, that it is the *report* that is protected by the privilege. Nothing under either statute prohibits the Commonwealth's Attorney from calling such witnesses at trial. Moreover, where, as here, the opinion of future dangerousness was based on the defendant's criminal record, the testimony is admissible so long as the expert does not use "statements or disclosure" made to him by the defendant as part of the basis for forming his opinion on future dangerousness. Virginia Code § 19.2-264.3:1G; *Stewart v. Commonwealth*, 245 Va. 222, 427 S.E.2d 394, *cert. denied*, 114 S.Ct. 143 (1993) Counsel's performance cannot be under *Strickland*, called into question for failure to object to the testimony of Drs. Ryans and Centor. Moreover, petitioner has failed to show any prejudice resulting from the testimony of these witnesses. *Strickland*.

Counsel also acted reasonably in not cross-examining Drs. Centor and Ryans on their previous report where they found that petitioner would not be a future danger. Had counsel done so, the Commonwealth would have pointed out on redirect that the initial report was completed before these witnesses were aware of petitioner's criminal history.

In any event, this Court finds that the evidence of petitioner's criminal history alone was more than sufficient to support a finding of future dangerousness. Thus, petitioner can show no prejudice, and his claim must fail.

3. *Counsel's decision not to object to the testimony of Dr. Mansheim was proper.*

As noted earlier, Dr. Mansheim's report was protected by statute. His testimony, however, was not. As was the case with Drs. Ryans and Centor, Mansheim's testimony was not based on statements made to him by petitioner.

Even if Dr. Mansheim's report had been erroneously provided to the Commonwealth, the report contained no information of substance on the issue of future dangerousness. Petitioner, therefore, can show no prejudice under *Strickland*.

Opening statements and closing argument are entirely a matter of trial strategy. *See e.g., Clozza v. Murray*, 913 F.2d 1092 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 1123 (1991) (counsel's Opening and closing statements in capital murder case indicating hopelessness and disgust were consistent with trial strategy of maintaining credibility with jury). Counsel's performance, therefore, was competent under *Strickland*. Moreover, petitioner has alleged no prejudice, and has shown none, resulting from counsel's closing arguments.

E. The Jury was properly instructed.

The Court has stated in its findings that the jury was properly instructed. Counsel's performance, relative to instructions, therefore, was competent. Moreover, petitioner has failed to show any prejudice resulting from counsel's failure to request additional instructions. This is particularly true where, as here, petitioner has failed to proffer the instructions that he deeds [sic] appropriate.

F. Failure to raise objections.

This Court finds that counsel's performance in this area under *Strickland* was competent. In many instances cited by petitioner, counsel did, in fact, object to the testimony in question. In other instances, an objection, would have been inappropriate. Petitioner has failed to show, therefore, that counsel's performance was less than competent. Moreover, petitioner has failed to show any prejudice resulting from counsel's actions. His claim must, therefore, be dismissed.

G. Counsel was not ineffective during voir dire.

Petitioner has failed to show that counsel's actions during voir dire failed to meet the *Strickland* standard. Moreover, petitioner has failed to show any prejudice resulting from counsel's actions in this case. This claim must, therefore, be dismissed.

H. Counsel was effective on appeal.

Counsel is not required to raise every conceivable issue on appeal. Indeed, counsel has the responsibility of "winnowing out weaker arguments on appeal and focusing on the central issue, if possible, or at most, on a few key issues". *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Petitioner has not, therefore, shown that counsel was ineffective on appeal under the *Strickland* standard. Moreover, counsel has failed to allege, and has failed to show, that he was prejudiced by counsel's actions on appeal. His claim must, therefore, fail.

I. Counsel's performance in the Stroud and Solomon cases.

Counsel's performance in the Stroud and Solomon trials, was not deficient, nor has petitioner shown prejudice.

III. Procedurally Defaulted Claims.

A. The following claims are defaulted under the rule in *Slayton v. Parrigan*, 215 Va., 27, 205 S.E.2d 680 (1974)

I(A), I(C), II(A), II(B), II(C), III(C), VI, VIII(A), VIII(B), VIII(C), VIII(D), VIII(E), VIII(F), VIII(H), VIII(I), IX(A), IX(B), IX(C), IX(D), X, XII(A), XII(B), XIII, XIV, XV, XVI AND XVII[10]

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[10] By order of May 6, 1996, the Supreme Court of Virginia held that the following claims were defaulted under the rule in *Parrigan:* III(C), VIII(A), VIII(C), VIII(F), VIII(G), VIII(I) and XIII.

B. The following claims are defaulted under the rule in *Hawks v. Cox*, 211 Va. 95, 195 S.E.2d 271 (1970):

I(B), I(D), III(A), III(B), IV, V AND XI.

CONCLUSION:

The record of this case establishes that Terry Williams' trial attorneys rendered constitutionally effective assistance of counsel at all stages of the proceedings, save and except the sentencing phase, which did not measure up to the standard required under the holding of *Strickland v. Washington*, 466 U.S. 668 (1984), and that there is a reasonable probability that the result of the sentencing phase would have been different. As a result, it is recommended that the petition be given a re-hearing on the sentencing phase of his trial for capital murder.

Respectfully submitted,

/s/ James F. Ingram
James F. Ingram Judge

Terry WILLIAMS
v.
WARDEN OF THE MECKLENBURG CORRECTIONAL CENTER.

Record No. 960534.

Supreme Court of Virginia.

June 6, 1997.

Brian A. Powers (Francis J. Martorana; Ellen O. Boardman; Linda J. Tarlow; O'Donoghue & O'Donoghue, on brief), Washington, DC, for petitioner.

Robert Q. Harris, Assistant Attorney General (James S. Gilmore, III, Attorney General, on briefs), for respondent.

Present: All the Justices.

UPON A PETITION FOR A WRIT OF HABEAS CORPUS

COMPTON, Justice.

This is the first habeas corpus petition filed by a prisoner held under a sentence of death that we have addressed in a published opinion since the applicable statute was amended effective July 1, 1995. *See* Acts 1995, ch. 503.

The 1995 amendment to Code § 8.01-654 added subsection (C). It provides that this Court shall have "exclusive jurisdiction" to consider and award writs of habeas corpus with respect to any such petition filed by a convict held under a death sentence. § 8.01-654(C)(1). The amendment further provides that the circuit court "which entered the judgment order setting the sentence of death

shall have authority to conduct an evidentiary hearing on such a petition only if directed to do so by order of the Supreme Court." *Id.*

The amendment fixes time limits within which the circuit court "shall conduct" a hearing on the issues enumerated in this Court's order and within which the circuit court "shall report its findings of fact and recommend conclusions of law to the Supreme Court." § 8.01-654(C)(3). Finally, the amendment provides that any objection to the circuit court's report must be filed in this Court, within a specified time limit. *Id.*

Petitioner Terry Williams was convicted in a jury trial in the Circuit Court of the City of Danville of the capital murder of Harris Thomas Stone. The crime was committed in November 1985, the accused was indicted in July 1986, and the jury found him guilty in September 1986.

After a separate proceeding on the issue of punishment and after hearing evidence of the accused's history, including aggravating factors and mitigating evidence, the jury fixed his sentence at death. This sentence was based upon the "future dangerousness" predicate of the statutory scheme; the verdict stated there is a probability that the defendant "would commit criminal acts of violence that would constitute a continuing serious threat to society."

Following a statutorily mandated hearing before the trial judge on punishment, the defendant was sentenced in November 1986 to death. This Court affirmed the conviction and death sentence on direct appeal. *Williams v. Commonwealth*, 234 Va. 168, 360 S.E.2d 361 (1987). The United States Supreme Court refused review. *Williams v.*

Virginia, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

In August 1988, the convict filed a habeas corpus petition in the Danville Circuit Court. After a 1989 hearing, the court dismissed a number of the habeas claims. An amended petition was filed in April 1995, and the court heard evidence in June 1995 on the issue of ineffective assistance of trial counsel.

On July 1, 1995, jurisdiction over the case was transferred to this Court pursuant to the changes in Code § 8.01-654. Subsequently, this Court directed the circuit court to "report its findings of fact and recommend conclusions of law regarding the issue of ineffective assistance of counsel, as alleged in claim VII" of the amended petition. In June 1996, the circuit court heard argument of counsel on the ineffective assistance of counsel claim.

In August 1996, the circuit court forwarded its report to this Court and to counsel for the parties. The circuit court found that the accused's two trial counsel were effective in all but one stage of the trial proceedings. The circuit court concluded that trial counsel's failure to present certain mitigating evidence at the sentencing hearing before the jury warranted the granting of relief to the petitioner.

Both the petitioner and the respondent, J.D. Netherland, Warden of the Mecklenburg Correctional Center, filed objections to the circuit court's rulings. In a January 1997 order, this Court ordered briefing and argument on the issue that the circuit court had found warranted

relief. Petitioner's objections to the circuit court's findings recommending dismissal of all the other claims for relief were overruled.

The evidence presented in the 1986 criminal trial established the following basic facts. The victim, an elderly man, was found dead at 2:00 a.m. lying in a bed at his Danville home. He was fully clothed and there was no sign of a struggle. The victim's wallet, customarily kept fastened in his trouser pocket, was missing.

Later, the accused made several confessions to the murder and robbery of the victim. The defendant said he had struck the victim on the chest, and later on the back, with a mattock and had removed three dollars from the victim's wallet. The victim died from the blows, which fractured two ribs and displaced them inward, puncturing the left lung and depositing a quantity of blood in the left chest cavity.

During the penalty phase of the trial, the prosecution presented evidence of the 31-year-old accused's extensive criminal record, beginning when he was 11 years old. This included a robbery in 1976, a burglary involving an assault upon the victim in 1982, and a vicious and brutal malicious wounding of an elderly woman in March 1986 that caused brain damage and left her a "vegetable." In addition, there was evidence of a December 1985 assault by the accused upon an elderly man while the accused was committing arson of the victim's home. Two forensic psychological experts who examined the accused testified there was a high probability that he would commit future criminal acts of violence and that he constituted a continuing threat to society.

The accused's mother testified that he was never violent at home and that she did not believe he was a threat to others. A female acquaintance of the accused who had known him for 11 years testified he was never violent in her presence. Another witness, whose foster daughter had dated the accused, testified he was not a violent person.

Based on the June 1995 habeas evidentiary hearing and the subsequent argument of counsel, the circuit judge, who had presided at the trial, made a number of "findings of fact" and "recommended conclusions of law." The court found that the convict's "trial attorneys were both experienced in criminal defense work and thoroughly prepared the case in defense of capital murder." In this connection, the court concluded that counsel's "performance at the guilt phase of the trial was both professional and competent."

Elaborating, the court stated that counsel "properly explored the mental competency of" the accused, who, according to the evidence at trial, had a "borderline level of intellectual functioning." Also, the circuit court found that trial counsel "adequately investigated the issues of robbery and cause of death"; that counsel "was justified in relying on" the conclusions of the medical examiner regarding the cause of death; that counsel's "conduct with regard to the confession and suppression hearing was competent and professional"; and that they were not ineffective for their failure to investigate whether the accused suffered from a so-called "Fetal Alcohol Syndrome." Further, the court concluded that counsel performed adequately regarding voir dire, evidentiary objections, and jury instructions.

Additionally, the circuit court found that the performance of defense counsel, in the main, during the penalty phase proceedings did not warrant habeas relief. And, the court determined counsel was effective on appeal.

The court reported, however, that certain actions of counsel during the trial's penalty phase were "the only real concern." "Specifically," the court said, "little evidence was presented on the issue of mitigation, and there exists evidence that petitioner had a deprived and abused upbringing; that he may have been a neglected and mistreated child; that he came from an alcoholic family; and that he was borderline mentally retarded."

Continuing, the court said there also exists "evidence that petitioner's conduct had been good in certain structured settings in his life (such as when he was incarcerated) and there were friends, neighbors and family of petitioner who would have testified that he had redeeming qualities." The court was of the view that some of this testimony "such as [from] petitioner's wife, daughter and Bruce Elliott, was worthy of a jury's consideration on mitigation. However, none of this testimony was developed and presented at the sentencing phase of the trial."

The court stated: "Probably the most persuasive mitigating evidence which was not tendered to the jury involved the failure to interview and call Bruce Elliott as a witness during the sentencing phase." Elliott, a certified public accountant, contacted defense counsel prior to trial and offered his help, but, according to the court, "counsel never followed up by talking to the witness." The court found that Elliott had known the accused since 1978 and would have portrayed the accused "as a decent human

being who struggled to prove his worth in spite of his being somewhat disadvantaged mentally, emotionally and financially." Elliott, who did not testify at the habeas hearing, stated in an affidavit that the accused "took pride in his achievements," such as graduation from carpentry school while incarcerated in a correctional facility.

The court found that trial counsel "made a tactical decision to focus attention at the penalty phase" on the accused's confession, which was unsolicited and volunteered. Counsel's strategy, the court concluded, was to convince the jury that the accused's life should be spared, and that he should be given a life sentence, because of the unsolicited confession.

Also, the court said that counsel "made a tactical decision not to put certain witnesses before the jury to prevent the Commonwealth from reminding the jury of the 'horrible and terrible crimes' " committed by the accused. Nevertheless, the court said, "it is troubling . . . that favorable evidence was not pursued and introduced for 'whatever it was worth' when the decision which was to be made by the jury involved life or death."

Summarizing, the court opined that at "a capital murder sentencing, any evidence which might be favorable or mitigating can mean the difference between 'life or death.' " Continuing, the court stated that "mitigating testimony is absolutely crucial and if none is offered, this amounts to prejudice." In addition, the court said that a failure "to present favorable mitigation evidence which was available upon investigation and development falls below the range expected of reasonable, professional

competent assistance of counsel, and because this evidence is so crucial to the outcome of the jury's ultimate decision of life or death, it is prejudicial to a defendant when it is not presented at the sentencing phase." This is such a case, according to the court, because "Terry Williams needed anything and everything that might be available as favorable evidence to persuade the jury to save his life. Anything less was not enough."

Therefore, the court recommended that a writ of habeas corpus be granted and that the convict be granted a rehearing on the sentencing phase of his trial.

The right to counsel, guaranteed by the Sixth Amendment to the Federal Constitution and made applicable to the states through the Fourteenth Amendment, includes the right to effective assistance of counsel. *Murray v. Griffith*, 243 Va. 384, 388, 416 S.E.2d 219, 220 (1992) (citing *Virginia Dep't of Corrections v. Clark*, 227 Va. 525, 533, 318 S.E.2d 399, 403 (1984)). This constitutional guarantee "includes the right to the care and skill which a reasonably competent attorney would exercise for similar services under the circumstances." *Stokes v. Warden*, 226 Va. 111, 116-17, 306 S.E.2d 882, 884 (1983). In other words, the accused is entitled to counsel who is a reasonably competent attorney and to advice that is within the range of competence demanded of attorneys in criminal cases. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

In a collateral attack on a conviction, however, "a prisoner not only has the burden of proving ineffective assistance of counsel, but also must prove actual prejudice as a result." *Stokes*, 226 Va. at 118, 306 S.E.2d at 885.

Accord Strickland, 466 U.S. at 687, 104 S.Ct. at 2064; *Murray*, 243 Va. at 388, 416 S.E.2d at 221. In order to establish prejudice, there must be a showing "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691, 104 S.Ct. at 2066.

In sum, *Strickland* requires a prisoner to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. And, in determining the existence of prejudice, the court must consider the totality of the evidence presented at the criminal trial. *Id.* at 695, 104 S.Ct. at 2068-69. *Accord Strickler v. Murray*, 249 Va. 120, 128, 452 S.E.2d 648, 652, *cert. denied*, 516 U.S. 850, 116 S.Ct. 146, 133 L.Ed.2d 92 (1995).

"As is obvious, *Strickland's* standard, although by no means insurmountable, is highly demanding." *Kimmelman v. Morrison*, 477 U.S. 365, 382, 106 S.Ct. 2574, 2586, 91 L.Ed.2d 305 (1986). *Accord Strickler*, 249 Va. at 128, 452 S.E.2d at 652. Moreover, "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993). And, "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant a defendant a windfall to

which the law does not entitle him." *Id.* at 369-70, 113 S.Ct. at 842-43.

Further, we have adopted the *Strickland* suggestion, 466 U.S. at 697, 104 S.Ct. at 2069-70, that if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickler*, 249 Va. at 128, 452 S.E.2d at 652. We shall employ that procedure in the present case.

This brings us to a determination of the standard of review that we shall apply to the circuit court's findings of fact and conclusions of law. We hold that, under the 1995 amendment to Code § 8.01-654, the issue whether a prisoner held under a death sentence is entitled to habeas relief is a mixed question of law and fact. Therefore, a circuit court's finding and conclusion on the issue is not conclusive and binding upon this Court but is properly subject to judicial review. *See The Stenrich Group v. Jemmott*, 251 Va. 186, 192, 467 S.E.2d 795, 798 (1996). Indeed, this is the standard of review employed in similar cases in the federal system. The Supreme Court has said "that both the performance and the prejudice components of the ineffectiveness test are mixed questions of fact and law" and that "a state court's ultimate conclusions regarding competence and prejudice are not findings of fact binding on the federal court." *Kimmelman*, 477 U.S. at 388-89, 106 S.Ct. at 2590 (citing *Strickland*, 466 U.S. at 698, 104 S.Ct. at 2070).

In the present case, the factual part of the mixed question is whether there was evidence in mitigation that was available but not presented at the criminal trial. There is no doubt there was such evidence; the facts

really are not in dispute. The legal part of the mixed question is whether this deficient performance constitutes "prejudice" within the meaning of that term as defined by the decided cases. In resolving this part of the question, the crucial inquiry is whether the circuit court correctly applied the law to the established facts. We hold that it did not.

In his brief filed in this Court in support of the circuit court's conclusions, the prisoner dwells upon the facts relating to the performance prong of the *Strickland* test, and has comparatively little to say about circumstances relating to the prejudice prong. He says there is "no merit" to the respondent's contention "that presentation of any additional witnesses would have done Petitioner more harm than good as each new witness would only give the prosecutor a renewed opportunity to hammer home the details of Petitioner's checkered criminal past."

Reverting to a discussion of performance in a prejudice section of his brief, the prisoner states: "In any event, even if counsel had sought to discover [available mitigation evidence of which counsel was ignorant], fear of 'opening the door' with each witness – to a repetition of Petitioner's criminal history – is not a reasoned decision given the facts of this case." Continuing, he argues that the prosecutor's "relentless recitation of Petitioner's bad acts had already been detailed for the jury through twelve different witnesses before Petitioner's counsel even stepped up to the plate. Any door that trial counsel feared would be opened by the presentation of additional mitigation witnesses had already been swung wide with gusto," and no amount of vigorous cross-examination by the prosecutor "could have left the jury feeling any worse

about Petitioner than they had at the conclusion of the prosecutor's case."

The prisoner argues there "is a 'reasonable probability' that at least one juror would have been moved to spare Petitioner's life had he heard" the mitigation evidence developed at the habeas hearing that was not presented at the trial. Summarizing, he contends there "is a 'reasonable probability' that had at least one juror heard any of this evidence – let alone all of this evidence – the outcome of this case would have been different."

We reject these contentions. The prisoner's discussion flies in the face of the Supreme Court's admonition in Lockhart, supra, that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective."

We shall demonstrate that the criminal proceeding sentencing defendant to death was not fundamentally unfair or unreliable, and that the prisoner's assertions about the potential effects of the omitted proof do not establish a "reasonable probability" that the result of the proceeding would have been different, nor any probability sufficient to undermine confidence in the outcome. Therefore, any ineffective assistance of counsel did not result in actual prejudice to the accused.

The jury was presented with the murder of an intoxicated, elderly person in his own bedroom committed by a 31-year-old man. The murder weapon was a tool customarily used to dig stumps. At the time, defendant had been out of the penitentiary for only seven months, released on parole for convictions of burglary and grand larceny.

The accused was in the midst of a crime spree, preying upon defenseless individuals. Following commission of these crimes of murder and robbery in November 1985, the defendant savagely beat an elderly woman about her head in March 1986, leaving her lying in the street unconscious with multiple injuries. At the time of trial, she was in a nursing home "vegetating" from a brain injury with no hope of recovery.

Upon being questioned in April and May 1986 about the November 1985 crimes, the defendant admitted to the recent theft of two motor vehicles. He also admitted setting fire to clothes on the porch of a residence late one night in December 1985, luring the occupant outside, and stabbing him with a knife in order to rob him. The accused later was convicted of the vehicle thefts and, at the time of trial for the present crimes, had been convicted of an arson that took place in the city jail.

While held in jail on the present offenses, he related to a police officer "that he wanted to just choke some of the guys in the jail cell, and one day some had gone to the library and one guy was laying on the bed, and he got the urge to just go over and choke him. Another time he was playing cards and he thought he could just hit someone and break that person's jaw without him ever knowing what hit him."

The jury also heard that defendant had served time in the penitentiary for an armed robbery committed when he was about 20 years old. The jury did not know of 14 criminal offenses committed by defendant from 1966 to 1975.

Drawing on *Strickland*, we hold that, even assuming the challenged conduct of counsel was unreasonable, the prisoner "suffered insufficient prejudice to warrant setting aside his death sentence," 466 U.S. at 698-99, 104 S.Ct. at 2070, the predicate of which was that there is a probability that he would commit criminal acts of violence which would constitute a continuing serious threat to society. The mitigation evidence that the prisoner says, in retrospect, his trial counsel should have discovered and offered barely would have altered the profile of this defendant that was presented to the jury. At most, this evidence would have shown that numerous people, mostly relatives, thought that defendant was nonviolent and could cope very well in a structured environment. Of course, those assumptions are belied by the four-month crime spree beginning with the present crimes and by the defendant's current attitude while in jail toward other inmates.

What the Supreme Court said in *Strickland* applies with full force here: "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." 466 U.S. at 700, 104 S.Ct. at 2071. Indeed, disclosure of the defendant's juvenile history might even have been harmful to his case.

Unfortunately, the circuit court appears to have adopted a per se approach to the prejudice element. The court opined that "any evidence which might be favorable or mitigating can mean the difference between 'life

or death' "; that "mitigating testimony is absolutely crucial and if none is offered, this amounts to prejudice"; and that the accused "needed anything and everything that might be available as favorable evidence to persuade the jury to save his life. Anything less was not enough." This demonstrates an emphasis on mere outcome determination, without proper attention to whether the result of the criminal proceeding was fundamentally unfair or unreliable.

In conclusion, employing the language of *Strickland*, the prisoner "has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. [The prisoner's] sentencing proceeding was not fundamentally unfair." 466 U.S. at 700, 104 S.Ct. at 2071.

Accordingly, the petition for a writ of habeas corpus, as amended, will be denied.

Writ denied.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

TERRY WILLIAMS, Petitioner,	)	
v.	)	CIVIL ACTION NO. 97-1527-A
SAM PRUETT, WARDEN MECKLENBURG CORRECTIONAL CTR. Respondent.	)	

ORDER

For the reasons set forth in the attached Memorandum Opinion, it is hereby ORDERED that:

(1) the petition for habeas corpus, to the extent it challenges the legality of the sentencing procedure pursuant to which petitioner was sentenced to death on November 19, 1986 by the Circuit Court, City of Danville, Virginia, is GRANTED;

(2) the said sentence of death is vacated;

(3) Petitioner shall be resentenced in the Circuit Court, City of Danville, Virginia, within a reasonable time, pursuant to Virginia Code § 19.2-264.3(C);

(4) Petitioner's Motion to Compel Discovery, to Transfer Petitioner, and to Provide Funds for the Retention of Certain Experts is DENIED;

(4) the Clerk of the Court shall forward copies of this Order and Memorandum Opinion to all counsel of record.

/s/ James C. Cacheris
United States District Judge

April 7th, 1998
Alexandria, VA

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

TERRY WILLIAMS, Petitioner,	)	
v.	)	
SAM PRUETT, WARDEN, MECKLENBURG CORRECTIONAL CENTER, Respondent.	)	CIVIL NO. 97-1527-A

MEMORANDUM OPINION

This matter comes before the Court on Terry Williams' ("Williams" or "Petitioner") Petition for a Writ of Habeas Corpus For the reasons set forth below, Williams' Petition is GRANTED in part and DENIED in part.

Facts.

Williams was indicated on July 7, 1986, for the capital murder of Harris Thomas Stone ("Stone") on November 2, 1985, while in the commission of the armed robbery of Stone in violation of Virginia Code section 18.2-31(d). A second count of the indictment charged Williams with the robbery of Stone during the course of the capital murder.

On September 30, 1986, a jury found Williams guilty of both charges, fixing his punishment for robbery at seven years imprisonment. In a separate proceeding mandated by Virginia Code section 19.2-264.4, after hearing

evidence of Williams' history, including aggravating factors and mitigating evidence, the jury fixed Williams' sentence at death, based on his future dangerousness." After considering the probation officer's report and other evidence in a further hearing, the trial court, by its order dated November 19, 1986, sentenced Williams to death for capital murder. The Supreme Court of Virginia affirmed his conviction on September 4, 1987, *Williams v. Commonwealth*, 234 Va. 168, 360 S.E.2d 361 (1987), and the United States Supreme Court denied review. *Williams v. Virginia*, 484 U.S. 1020 (1988).

Williams' habeas corpus petition was filed in the Danville Circuit Court on August 26, 1988. The court dismissed some claims as procedurally barred by Order of April 4, 1990. An amended petition was filed on April 24, 1995, and the circuit court held an evidentiary hearing on Williams' claims of ineffective assistance of counsel on June 15 and 16, 1995.

On July 1, 1995, jurisdiction over the case was transferred to the Virginia Supreme Court pursuant to the changes in Virginia Code section 8.01-654. By order of May 6, 1996, the Supreme Court directed the lower court to "report its findings of fact and conclusions of law regarding the issue of ineffective assistance of counsel," pursuant to section 8.01-654(C)(3). The May 6 order also ruled several of Williams' claims defaulted.

The circuit court filed its order and Findings of Fact and Recommended Conclusions of Law, dated August 15, 1996, finding that trial counsel were effective in all circumstances of the trial but one: the circuit court concluded that trial counsel's failure to present mitigating

evidence at sentencing warranted the granting of relief. Both Williams and the respondent filed objections to the circuit court's findings. On January 13, 1997, the Virginia Supreme Court ordered briefing and argument on the issue that the lower court found warranted relief. The Supreme Court accepted the circuit court's findings recommending dismissal of all other claims, overruling Williams' objections.

On June 16, 1997, the Supreme Court by unanimous opinion rejected the circuit court's recommendation for relief, and denied the relief. *Williams v. Warden,* 254 Va. 16, 487 S.E.2d 194 (1997).

Following the denial of Williams' petition for rehearing on August 1, 1997, the Danville Circuit Court set an execution date of October 7, 1997. By Order of September 29, 1997, this Court stayed Williams' execution and appointed counsel for this action.

The facts underlying Williams' conviction and sentence are set forth in the Virginia Supreme Court's opinion denying his direct appeal. *See* 360 S.E. 361. They will be set forth below only to the extent required by the issues properly before this Court.

I. Present Claims.

Williams presents for consideration nineteen claims[1] based on his allegations that:

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[1] The numbered claims are as follows:

Claim I(A)(1): Motley's Mental Disability Rendered Him Constitutionally Ineffective;

(1) Trial counsel provided ineffective assistance;

Claim I(A)(2): Limitations on the payment of court-appointed counsel deprived indigent Petitioner of effective assistance of counsel;

Claim I(B)(1): Trial counsel failed to investigate, prepare or present mitigation evidence for the jury's consideration;

Claim I(B)(2): Trial counsel unreasonably failed to exercise Petitioner's right to bar the testimony of Centor and Ryans at the sentencing hearing;

Claim I(B)(3): Having unreasonably failed to exclude the testimony of Centor and Ryans, defense counsel unreasonably failed to cross-examine them in any meaningful way;

Claim I(B)(4)(a): Trial counsel unreasonably failed to appreciate that they had no experts to assist the defense and thus unreasonably failed to take corrective measures/ with regards to the Appointment of mental health experts;

Claim I(B)(4)(b): Trial counsel unreasonably failed to appreciate that they had no experts to assist the defense and thus unreasonably failed to take corrective measures/ with regards to the fact that Mental health experts did not conduct themselves as defense experts in violation of *Ake*;

Claim I(B)(5): Trial counsel was ineffective in focusing on the "horrible" nature of the crime rather than on mitigating factors;

Claim I(B)(6): Trial counsel failed to request jury instructions on the meaning and role of mitigation evidence;

Claim II(A): Failure to Prove Cause of Death;

Claim II(B): Failure to Prove the Robbery;

Claim III: Admission of Petitioner's Statements to Police was Improper and Prejudicial;

Claim IV: Evidence at Sentencing Concerning the Stroud Conviction and the Solomon Incident was Unduly Prejudicial;

(2) Insufficient evidence was presented of the cause of death and also to support his robbery conviction, both of which served as the necessary predicates for his capital sentence;

(3) Admission of his statements to police was improper and prejudicial;

(4) Evidence at sentencing concerning the *Stroud* trial and the *Solomon* case was unduly prejudicial;

(5) The death sentence was based upon improper allegations that he was not remorseful because he exercised his constitutional right to plead not guilty;

(6) The trial court erred in sustaining the prosecution's objection to defense counsel's discussion of the meaning of a life sentence;

(7) Imposition of the death penalty in Virginia is arbitrary because of the failure of the

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Claim V: The Death Sentence Was Based upon Improper Allegations that Petitioner Was Not Remorseful Because He Exercised His Constitutional Right to Plead Not Guilty;

Claim VI: The Trial Court Erred in Sustaining the Prosecution's Objection to Defense Counsel's Argument on the Meaning of a Life Sentence;

Claim VII: Imposition of the Death Penalty Was Arbitrary Because of the Virginia Supreme Court's Failure to Engage in Meaningful or Fair Appellate Review;

Claim VIII: Future Dangerousness Prong of Death Penalty Statute is Unconstitutionally Vague;

Claim IX: Virginia's Death Penalty Law Is Unconstitutional Because It Has Been Applied in a Discriminatory Manner;

Claim X: Imposition of the Death Penalty Is Unconstitutional Cruel and Unusual Punishment.

Supreme Court of Virginia to engage in meaningful or fair appellate review;

(8) "Future Dangerousness" factor in death penalty statute is unconstitutionally vague;

(9) The Virginia death penalty statute is unconstitutional because it has been applied in a discriminatory manner;

[and]

(10) Imposition of the death penalty violates the Eighth and Fourteenth Amendments since it constitutes cruel and unusual punishment.

II. Procedural Posture.

It is beyond contention that passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA" or "the Act") fundamentally altered the role of federal district courts reviewing petitions for habeas corpus brought by prisoners in state custody. According to the Fourth Circuit, the Act "abrogates the independence with which federal courts have reviewed habeas corpus claims since *Brown v. Allen*, 344 U.S. 443, 458 (1953)." *Mackall v. Murray*, 109 F.3d 957, 959 (4th Cir. 1997).

The Act essentially divides prisoner claims between those that were raised and addressed on their merits in state courts and those raised for the first time in federal court. However, the new procedural default provisions dealing with this second species of claim apply only to prisoners held in states that have "opted in" by providing certain minimum procedural and substantive protections to defendants. While the Fourth Circuit has avoided ruling on whether Virginia is an "opt in" state, the Court is

guided by the prevailing opinion of the district courts that have confronted the issue and held that Virginia is not an "opt in" state. *See Breard v. Netherland*, 949 F. Supp. 1255 (E.D.Va. 1996); *Wright v. Angelone*, 944 F. Supp. 460 (E.D.Va. 1996); *Satcher v. Netherland*, 944 F. Supp. 1222 (E.D.Va. 1996). Accordingly, Williams' claims will be judged as defaulted or not according to the standards applicable prior to AEDPA's enactment.

A. Claims that are procedurally barred.

In *Smith v. Murray*, the United States Supreme Court held that federal courts reviewing habeas corpus petitions must apply state rules governing procedural default "unless the defendant succeeds in showing both 'cause' for non-compliance with the state rule and 'actual prejudice resulting from the alleged constitutional violation.' " 477 U.S. 527, 533 (1986); *Barnes v. Thompson*, 58 F.3d 971, 974 (4th Cir. 1995). In cases arising under Virginia law, "failure to raise a claim on direct appeal from a criminal conviction ordinarily bars consideration of that claim in any subsequent state proceeding." *Smith*, 477 U.S. at 533 (citing *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974)).

In *Gray v. Netherland*, the Supreme Court held that the Virginia rule barring consideration of "any allegation the facts of which the petitioner had knowledge at the time of filing any previous petition" served as adequate and independent state grounds for denying relief and prohibited federal courts from considering such claims absent cause and prejudice. 116 S.Ct. 2074, 2081 (1996) (citing Va. Code § 8.01-654(B)(2) (1992)).

Defining what constitutes valid cause depends on the specific posture and facts of each case. The Supreme Court held in *Smith* that "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." *Smith*, 477 U.S. at 535 (quotations and citations omitted). *See also Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997). Instead, Petitioner must show an "external impediment preventing his counsel from constructing or raising the [omitted] claim." *Murphy*, 116 F.3d at 100 (citation omitted); *Barnes v. Thompson*, 58 F.3d at 974 (citing *Clayton v. Muncey*, 845 F.2d 1238, 1241 (4th Cir.), *cert. denied*, 485 U.S. 1000 (1988)). The *Smith* Court went on to conclude that counsel's process of winnowing out weaker claims and focusing on those perceived to be stronger rarely violates the standards for effective representation set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

Regarding claims that a prisoner failed to bring on state habeas, the Fourth Circuit has held that a petitioner has "no right to counsel (effective or otherwise) on state habeas, and cannot claim ineffective assistance of state habeas counsel, or claim that counsel's errors were cause for procedural default." *Smith v. Angelone*, 111 F.3d 1126, 1133 (4th Cir. 1997). *Mackall*, handed down less than one month before *Smith*, seems to carve out a narrow exception to *Smith's* rule for claims that may only be brought for the first time on state habeas. *Mackall*, 109 F.3d at 963.

B. Claims not procedurally barred by state courts.

If a state court did address an issue's merits "the Act permits federal habeas corpus review only if the state court's decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law,' or 'was based on an unreasonable determination of the facts.' *Id.* § 2254(d)." *Mackall*, 109 F.3d at 959.

Under section 2254,

> [i]f the applicant has failed to develop the factual basis for a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that
>
> (A) the claim relies on
>
> • • •
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

C. The Posture of this Case.

These standards require the Court to initially sort out which claims have been defaulted, which were addressed on their merits by the state courts, and which require additional factual development in this Court. On direct

appeal, Williams failed to raise any of his present claims except those addressing: the voluntariness of his confession; insufficient evidence of the cause of death and of the robbery; admission of evidence concerning the *Stroud* trial; and the trial court's refusal at the penalty stage to allow argument regarding the meaning of a life sentence. Addressing these claims, the Virginia Supreme Court ruled that Williams' confession was voluntary. The Court concluded also that the corpus delicti was adequately established both as to the robbery and the cause of death. The Virginia Supreme Court ruled that Williams was not entitled to argue the meaning of a life sentence to the jury in the penalty phase of the trial. Finally, the Court ruled that the Commonwealth was entitled to present evidence of the malicious wounding of an elderly woman by Williams during the penalty phase of the trial. *Williams v. Commonwealth*, 234 Va. 168, 360 S.E.2d 361 (1995).

Williams' habeas corpus petition was filed in the Danville Circuit Court on August 26, 1988. The court dismissed some claims as procedurally barred by order of April 4, 1990. An amended Petition was filed on April 24, 1995, and the circuit court held an evidentiary hearing on Williams' claims of ineffective assistance of counsel on June 15 and 16, 1995.

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On June 16, 1997, the Supreme Court by unanimous opinion rejected the circuit court's recommendation for relief, and denied the relief. *Williams v. Warden*, 254 Va. 16, 487 S.E.2d 194 (1997).

III.

Defaulted Claims Requiring a Showing of Cause and Prejudice Before They May Be Considered.

The following claims either were never raised in state court or were raised and found defaulted under *Slayton v. Parrigan* by the Virginia Supreme Court: Petitioner's Claims I(B)(4)(a), I(B)(4)(b), IV (in part, relevant to the Solomon evidence), VII, VIII, IX, and X. Petitioner has failed to demonstrate both "cause for non-compliance with the state rules governing procedural default" and "actual prejudice resulting from the alleged constitutional

violation." Accordingly, these claims are defaulted and will not be reviewed by the Court.[2]

IV.

Claims Addressed on their Merits by Virginia Courts

A. Ineffective Assistance of Counsel

In order to succeed on a claim of ineffective assistance of counsel, Petitioner must show (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984). In this context, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Finally, counsel's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually

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[2] The Court notes that is has considered Petitioner's claims that defense counsel was constitutionally ineffective in failing to make objections, preserve errors and raise issues on appeal so as to avoid procedural defaults, and that defense counsel were constitutionally ineffective in their appeal of this case. The Court finds these arguments are without merit. *See, e.g., Pannier v. Murray*, 964 F.2d 1404, 1423 (4th Cir. 1992) ("with the benefit of hindsight, rarely can it be said that trial counsel made every possible objection and raised every conceivably viable argument. The law, however, requires not perfect but only professionally reasonable performance of counsel."); *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (appellate counsel has responsibility to winnow out weaker arguments and focus on central issue).

unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.*

"[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Id.* at 698. What historically happened is a question of fact, and this Court will grant habeas relief only if the decision of the Supreme Court of Virginia "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). Whether what happened constitutes ineffectiveness is a question of law, and this Court will grant habeas relief if the Supreme Court of Virginia's decision "was contrary to, or involved an unreasonable application of, clearly established federal law." *Id.*

1. Motley's alleged mental impairment during trial[3]

As noted above, Petitioner filed for a writ of habeas corpus in the Circuit Court of the City of Danville on August 26, 1988. On August 26, 1988, the court held argument and dismissed numerous claims. On or about April 24, 1995, the Petitioner filed an amended petition for a writ of habeas corpus, again in the circuit court. On June 15 and 16, 1995, the circuit court held an evidentiary hearing on the issues of ineffective assistance of counsel. On July 1, 1995, however, the circuit court lost jurisdiction over the case, pursuant to Virginia Code § 8.01-654, and transferred the case to the Supreme Court of Virginia.

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[3] Petitioner's Claim I(A)(1).

On May 6, 1996, the Supreme Court of Virginia entered an order directing the circuit court to "report its findings of fact and recommend conclusions of law regarding the issue of ineffective assistance of counsel." On June 24, 1996, the circuit court again heard arguments from counsel on the issue of the ineffective assistance of counsel claim.

Judge Ingram made the following initial findings of fact regarding Williams' trial counsel, E.L. Motley, Jr.'s, mental state during the trial:

> Petitioner alleges that he was denied his Sixth Amendment right to counsel because E. L. Motley, Jr. was mentally impaired and unable to effectively represent him in the preparation, trial and appeal of his complex, capital murder case. This court has heard evidence relating to this claim, but finds that Motley was not acting under a mental or emotional disability during the course of his representation of Williams. Specifically, Motley did not begin to have problems related to his depression until the late spring or early summer of 1987. Williams' case was tried in 1986. His brief on direct appeal was filed in March, 1987. The opinion of the Supreme Court of Virginia was issued in September, 1987.
>
> It is clear that what problems Motley did have thereafter did not manifest themselves during the trial of this case. Motley prioritized his work by placing the criminal matters ahead of civil matters, and capital murder cases receiving the highest priority. Both Motley and Smitherman prepared the appellate brief, after being counsel in the trial of these cases.

> During the two years that he knew Motley, Smitherman never noticed anything unusual about Motley during the course of Williams' trial. Smitherman did not begin to notice a difference in Motley's behavior until 1988. Smitherman noticed no sign of any dysfunction in Motley during the time of their joint representation of Williams.
>
> Based on the testimony at the evidentiary hearing, and on the personal observations of this Court during the course of the criminal trial, this Court finds that E. L. Motley was acting under no disability during the course of his representation of the petitioner. Furthermore, to the extent that any claim presented by the petitioner herein is based on the mental problems suffered by Mr. Motley, such claims lack merit.
>
> In fact, at no time during the trial did Motley exhibit any conduct which would lead one to believe he was suffering from any disability.

Williams v. Netherland, No. LP88-81 at 5-7 (Danville Cir. Ct. Aug. 15, 1996) (hereinafter "Findings").

Petitioner argues that these findings are "an unreasonable determination of the facts in light of the evidence presented." In support of his contention, Petitioner points to certain testimony elicited during the two-day hearing on the ineffective assistance. Petitioner notes that Motley himself testified that his depression had been ongoing for years before "things started spinning out of control," and that Motley further conceded that his depression was something even he couldn't "put a finite beginning or ending date on." Petitioner points out that Motley himself conceded that it was his depression that ultimately

rendered him incapable of practicing law such that, after a series of bar complaints and reprimands, he was forced to surrender his license in 1989.

Judge Ingram's findings are not "an unreasonable determination of the facts in light of the evidence presented." The Court notes Mr. Motley's testimony during the two-day hearing before Judge Ingram:

> Q Well let me just see if I understand this, Mr. Motley. Are you saying that you were depressed and unable to attend to details when it came to civil matters, but you had no problem when it came to criminal matters?
>
> A Generally I was able to handle criminal matters all right.
>
> Q So you were able to compartmentalize your depression in that respect?
>
> A . . . Some things I could do fine. I was able to get my criminal work done, was able to get my bankruptcy work done, but other things at the office slid, yes, and that is what I had problems with.

Transcript of state Habeas Corpus Evidentiary Hearing at 46-48 (hereinafter "Hearing Transcript").

The Court has carefully examined the transcript of the State Habeas Corpus Evidentiary Hearing and finds that the testimony supports Judge Ingram's findings that Mr. Motley's work was not adversely affected by his depression until after the conclusion of William's trial and appeal, and also that Mr. Motley was able to handle his criminal work throughout his bouts with depression. The Court also notes that Judge Ingram presided over the

Williams trial and thus is in the unique position of being able to judge Motley's performance during trial.

2. Compensation of court-appointed defense counsel[4]

Petitioner claims that the circuit court's finding that there is "no nexus" between the lack of compensation and trial counsel's performance is unreasonable in light of the evidence presented in state court. Petitioner cites Motley's testimony that he asked the circuit court to appoint a private investigator to assist him, but the motion was denied. Motley was unable to pursue his need for his professional assistance any further because "[n]either Mr. Smitherman nor [Motley] had the resources to hire a private investigator" and neither Williams nor his family had the money to pay for such services. Hearing Transcript at 69. Petitioner also cites Smitherman's testimony that no thought was given to obtaining a pathologist, notwithstanding that the cause of death was a critical issue in this case and had variously been determined to be natural causes, then alcohol poisoning, then a compressed lung, because "we didn't have any money" and he and Motley "didn't know that the Court could even appoint a pathologist." Hearing Transcript at 151.

The circuit court's findings were not based on an unreasonable determination of the facts. The fact that Petitioner was denied the services of a private investigator certainly does not amount to ineffective assistance of counsel. Petitioner has not demonstrated that the lack of

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[4] Petitioner's Claim I(A)(2)

money was the cause for counsel's failure to obtain testimony of their own expert pathologist.[5]

3. Mitigation Evidence[6]

After the conclusion of the hearing regarding ineffective assistance of counsel in the Danville Circuit Court, Judge Ingram entered certain findings of fact and conclusions of law regarding Williams' habeas petition. He found all of Petitioner's claims to be without merit, except for trial counsel's performance during the penalty phase. "Specifically, little evidence was presented on the issue of mitigation, and there exists evidence that petitioner had a deprived and abused upbringing; that he may have been a neglected and mistreated child; that he came from an alcoholic family; and that he was borderline mentally retarded." Judge Ingram also noted that there was evidence that "petitioner's conduct had been good in certain settings in his life (such as when he was incarcerated) and there were friends, neighbors and family of petitioner who would have testified that he had redeeming qualities." None of this testimony was developed and presented at the penalty phase of the trial. Judge Ingram found that "[w]ith so little favorable testimony in the way of mitigation and faced with much unfavorable evidence on the question of future dangerousness, this information could have been critical in the jury's decision as to Williams' punishment." Findings at

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[5] Petitioner maintains a separate claim of ineffective assistance of counsel based an counsel's failure to hire an expert pathologist. This claim is addressed separately, below.

[6] Petitioner's Claim I(B)(1).

21. The Judge then recommended that the Petitioner be granted a re-hearing on the sentencing phase of the trial. The Virginia Supreme Court did not accept the circuit court's recommendation, and held that defense counsel's failure to discover and present certain mitigating evidence during the penalty phase did not result in prejudice amounting to ineffective assistance of counsel, as would warrant habeas relief.

a. Performance

The Virginia Supreme Court disposed of Williams' ineffectiveness claim on the ground that sufficient prejudice did not result from counsel's failure to introduce certain mitigating evidence. The Virginia Supreme Court, thus, did not address the question of whether counsel's performance fell below the range of competence demanded of lawyers in criminal cases.

It is important and relevant to both the performance and the prejudice prongs of the *Strickland* test, to set forth in some detail the mitigating evidence, which counsel either failed to investigate, or did investigate but decided not to introduce during the sentencing hearing.

(i) Counsel did not introduce evidence of the Petitioner's background. Some detail is necessary here, because Petitioner's childhood was particularly troubled. It is clear that Petitioner was not providcd with basic necessities from a very early age. Petitioner's record obtained from the Danville Juvenile Court contains information filed after an investigation of Williams' home, when Williams was one year old. An officer from the Danville Police Department was sent to the Williams

home, after the Department received a notice that the parents were on the front porch, and were "in such a state that they could not talk plain" and that the five children inside were passed out from drinking "some intoxicating beverage." The following report was filed:

> Lula and Noah [the parents] were sitting on the front porch and were in such a drunken state, it was almost impossible for them to get up. They staggered into the house to where the children were asleep. Terry, age 1, and Noah Jr., age 3, were asleep on the sofa. There was an odor of alcohol on the breath of Noah, Jr. . . . Oliver [Olivia] had just awakened and was very sick. She said she was hungry and had been drinking whiskey. Ohair was completely passed out and never could be awakened. He did not have on any clothes, but was covered with a sheet.
>
> The home was a complete wreck. There were several men and one woman visiting in the home. . . . There were several places on the floor where some one had had a bowel movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered all over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash. The only food in the house was a pan of corn-bread, and this looked as if someone had been playing in it and had scattered it all over the floor. The children were all dirty and none of them had on under-pants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them. There was stuffed pickle scattered on the floor in the front be room [sic].

> Noah and Lula were put in jail, each having five charges of neglect placed against them. The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey. When Dr. Harvey examined them, he found that they had all been drinking bootleg whiskey. They were all hungry and very happy to be given milk, even the baby drank a pint of milk before stopping. Oliver [Olivia] said they had not had any food all day. Ohair was still so drunk he could not talk.
>
> The next day, Oliver [Olivia] said that her faher had sent Ohair out in the back yard to get a bottle of whiskey. He brought it in the house and said Ohair passed the bottle around to the children, while their mother and father watched them. Ohair said they had drunk whiskey before.

Pre-Hearing Investigation, Danville Juvenile Court, File #1341 at 17-18. Petitioner's juvenile records state that Williams was placed in a Court Boarding House and committed to the Danville Social Service Bureau for approximately two years before he was returned to the custody of his parents. *Id.* at 17. The report also lists several juvenile offenses, such as "breaking and entering the home of Susan Clark and the larceny of one box of doughnuts, one package of luncheon meat and twenty-five pennies," and pulling a fire-alarm. *Id.* at 20. The report contains information regarding Petitioner's parents. *Id.* It reveals that Petitioner's father was generally known as a "bootlegger." *Id.* The report also states that the father seemed to care about his children, but was limited by the fact that the family was so large (eleven children, ten between the ages of three and eighteen). *Id.*

The father was unable to secure adequate employment due to his limited education, and did not ask for public assistance. *Id.* The report reveals that Petitioner's mother had a tumor but could not afford an operation. *Id.* The report also comments on Petitioner's health: "Terry had a fall in 1965 and according to his mother he has not acted right since. He fell on the back of his head and a large place there. . . . [S]he still thinks that it affected his mind and in [her] words she states, 'He needs a head doctor.' " *Id.* at 21.

(ii) Counsel did not introduce evidence that Petitioner was abused by his father.

(iii) Counsel did not introduce testimony from correctional officers who were willing to testify that defendant would not pose a danger while incarcerated. Nor did counsel offer prison commendations awarded to Williams for his help in breaking up a prison drug ring and for returning a guard's missing wallet.

(iv) Several character witnesses were not called to testify. Petitioner's wife and ten-year-old daughter, who had attended the entire trial and were willing to testify, were not called as character witnesses. Both would have testified that Williams was a good and loving father. Another potential witness, Bruce Elliott, was not a family member. The trial judge found that the testimony of Elliott, a respected CPA in the community, could have been quite important to the jury: "His testimony would have portrayed petitioner as a decent human being who struggled to prove his worth in spite of his being somewhat disadvantaged mentally, emotionally and financially. . . . This testimony from a well-educated

professional would have had an impact on the jury on the question of future dangerousness, and could have tilted a juror to favor a life sentence." Findings at 20.

(v) Finally, counsel did not introduce evidence that Petitioner was borderline mentally retarded, though he was found competent to stand trial.

At the sentencing phase four witnesses were called for the defense, Dr. Mansheim, Ms. Moore (a woman whose foster daughter had dated Williams), Deborah Grant (a female acquaintance of Williams who had known him for eleven years), and Williams' mother. Trial Transcript at 639-661. Dr. Mansheim testified very briefly and told the jury that Williams had related a story to him that, during a robbery, Williams removed the bullets from a gun so that no one would get hurt. The other three character witnesses testified that Williams was not a threat to others and was not a violent person. The testimony of all four witnesses covers approximately twenty pages of the transcript, and does not mention anything about petitioner's childhood, mental ability, or anything else enumerated *supra*.

"It is obvious that counsel made a tactical decision to focus attention at the penalty phase on Williams' confession, the object being to convince the jury that Williams' life should be spared due to the fact that he had given an unsolicited confession to the police." Findings at 20 (citing Hearing Transcript at 98). Also, counsel made a tactical decision not to put certain witnesses before the jury to prevent the Commonwealth from reminding the jury of the "horrible and terrible crimes that Mr. Williams had done." Findings at 20 (citing Hearing Transcript at 157).

"With respect to investigating mitigating evidence, counsel's performance is deficient if he fails to make a reasonable investigation for possible mitigating evidence." *Matthews v. Everett*, 105 F.3d 907, 919 (4th Cir. 1997) (citing *Strickland*, 466 U.S. 668). In the *Matthews* case, the Fourth Circuit found that counsel's performance was not deficient under the *Strickland* standard, since counsel had done extensive investigation, including interviews with numerous witnesses, including the accused's family, a psychiatrist, and a psychologist. The Fourth Circuit also relied on the fact that, at sentencing, counsel called numerous witnesses, focusing on the accused's poor upbringing, poor performance in school, low I.Q., and adaptability to prison life.

Motley failed to made any such reasonable investigation on behalf of Williams. Motley did not even attempt to obtain Williams' juvenile records and records from Danville social services, not because he didn't believe these records would be important, but simply because he incorrectly believed that "state law didn't permit it." Hearing Transcript at 64. Motley later acknowledged that he believed that information about Williams' troubled life as a child would have been very important mitigating evidence. *Id.* Motley did not attempt to obtain Williams' prison records, either, even though the Supreme Court has held that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986).[7] Bruce Elliott, the Danville CPA who

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[7] The Court notes that Williams assisted in breaking up a prison drug ring while incarcerated at a time prior to the

had befriended Williams, took the initiative to call Motley and offer to testify as a character witness on Williams' behalf. Motley simply failed to return Elliott's phone call.

Motley's proffered "tactical" reasons for not offering certain mitigating evidence are unpersuasive. First, Motley testified that he decided to focus on Williams' voluntary confession. While deciding to focus on this piece of evidence is supportable as a tactical decision, focusing on it to the exclusion of all other mitigating evidence is unreasonable. "[T]he sentencer in all but the rarest kind of capital case [should] not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (emphasis in original). *See also Clark v. Townley,* No. 85-6601 (4th Cir. June 5, 1986) (In a case nearly identical to the one bar, the Fourth Circuit upheld the district court's grant of habeas relief because trial counsel failed to introduce mitigating evidence that petitioner had a very difficult childhood). Second, Motley testified that he did not want to offer additional character witnesses because their testimony would open the door to cross-

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penalty phase of the trial. This evidence, probative of Williams' "future dangerousness" was available for counsel's use at the sentencing phase. This case is thus unlike *Evans v. Muncy,* 916 F.2d. 163 (4th Cir. 1990) where the petitioner argued that evidence demonstrating he played in significant role in quelling a prison uprising which occurred after he had been sentenced to death entitled him to a new sentencing hearing.

examination which would surely consist of further recitations of the "horrible crimes" which Williams had committed. This argument would be reasonable if Motley had not offered three character witnesses at sentencing, all of whom were already asked if they were aware of Williams' other crimes. Also, since Motley failed to even obtain a proffer from Bruce Elliott and failed to question Williams' wife and daughter who were present throughout the trial, he did not have the information necessary to make an *informed* tactical decision. *See Clark v. Townley*, No. 84 Civ. 1271-AM, slip op. at 13-14 (E.D. Va. June 24, 1985).

Finally, the Court notes an important distinction between this case and *Strickland*, 466 U.S. 668. Petitioner in the *Strickland* case chose to be sentenced by the trial judge, instead of by the jury. Petitioner's attorney decided to offer no mitigating evidence. He chose, instead, to rely on the trial judge's reputation as one "who thought it important for a convicted defendant to own up to his crime" and who would show mercy to a defendant who had accepted responsibility for his crime. *Strickland*, 466 U.S. at 673. Motley was faced with a quite different tactical decision by virtue of the fact that the mitigating evidence had to convince only one juror that the death penalty was not warranted in Williams' case. Also, the attorney in *Strickland* introduced no character evidence at all, so that there would be no cross-examination. In the present case, Motley chose to introduce the testimony of four witnesses, all of whom were subject to cross-examination, but not to introduce other mitigating evidence. The introduction of the additional mitigating evidence in this case certainly would have had no negative consequences.

b. Prejudice

The determinative question under the prejudice prong of the *Strickland* test is whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id.*

Virginia Code § 19.2-264.4(E) provides that "In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life." Thus, the Petitioner only had to persuade one of the twelve jurors to hold out for mitigation. Given the amount of mitigating evidence not presented to the jury, the compelling nature of such evidence, and the fact that none of such evidence was cumulative, the Court concludes that there is a reasonable probability that had the jury heard this evidence, at least one juror and perhaps all, would have concluded that the death penalty was not warranted.

The Court finds error both in the Virginia Supreme Court's reliance on *Lockhart*, and in the Virginia Supreme Court's recitation of the facts in this case. First, the Virginia Supreme Court relied upon *Lockhart* in finding that Motley's failure to introduce the foregoing evidence was not prejudicial. The Virginia Supreme Court rejected Williams' argument that there "is a 'reasonable probability' that had at least one juror heard any of this evidence – let alone all of this evidence – the outcome of the case would have been different." The Virginia Supreme Court stated that "[t]he prisoner's discussion flies in the face of the

Supreme Court's admonition in *Lockhart* that 'an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.' " *Williams*, 487 S.E.2d at 199 (citing *Lockhart*). The Virginia Supreme Court quoted a portion of the *Lockhart* decision, stating, "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant a defendant a windfall to which the law does not entitle him." *Id.* at 198 (citing *Lockhart*, 506 U.S. at 369-70).

The *Lockhart* case is clearly distinguishable from the case before this Court. In the *Lockhart* case, the Supreme Court was faced with the question "whether counsel's failure to make an objection in a state criminal sentencing proceeding – an objection that would have been subsequently overruled – constitutes 'prejudice' " within the meaning of *Strickland*. *Lockhart*, 506 U.S. at 366. The Court found that, since prejudice is not determined under the laws existing at the time of trial, the petitioner was not actually deprived of any rights (i.e., at the time of the Supreme Court's decision, counsel would not have been entitled to make such an objection).

Justice O'Connor's concurrence makes clear the scope of the Court's decision in *Lockhart*:

> [T]oday's decision will, in the vast majority of cases, have no effect on the prejudice inquiry under *Strickland v. Washington*. The determinative question – whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," remains unchanged. This

> case, however, concerns the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry.

Justice O'Connor went on to quote *Strickland*, stating that certain factors, such as the possibility of mistake, "whimsy", "arbitrariness" or "the luck of a lawless decisionmaker" cannot be taken into account. *Id.* at 346-47 (quoting *Strickland*). Since *Strickland*, O'Connor notes, the Supreme Court has recognized that "neither the likely effect of perjured testimony nor the impact of a meritless Fourth Amendment objection is an appropriate consideration in the prejudice inquiry." *Id.* at 347.

> Today the Court identifies another factor that ought not inform the prejudice inquiry. Specifically, today we hold that the court making the prejudice determination may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission. . . . Consequently, respondent's claim of prejudice was based not on the allegation that he was denied an advantage the law might permit him. It was predicated instead on the suggestion that he might have been denied "a right the law simply does not recognize," namely the right to "have the state court make an error in his favor."

Id. at 374-75 (citation omitted).

Williams' case is quite different. Williams is entitled, by current law, to have all possible mitigating evidence

put before the sentencing jury. Williams has demonstrated that there was significant additional Mitigating evidence that was not offered to the jury at sentencing. Williams has satisfied the prejudice inquiry by showing, not only a reasonable probability that "the outcome would have been different but for counsel's error," but, unlike *Lockhart*, also that counsel's failure to introduce mitigating evidence was a right the law *does* recognize. Accordingly, the Virginia Supreme Court's decision involved an unreasonable application of *Lockhart* and the *Strickland* standard.

Second, the Court notes that, while the Virginia Supreme Court properly set forth the facts of the case in its opening summary of the case, it made an error of fact in discussing its finding of no prejudice. Specifically, the Virginia Supreme Court found no prejudice, reasoning: "The mitigation evidence that the prisoner says, in retrospect, his trial counsel should have discovered and offered barely would have altered the profile of this defendant that was presented to the jury. At most, this evidence would have shown that numerous people, mostly relatives, thought that defendant was nonviolent and could cope very well in a structured environment." *Williams*, 487 S.E.2d at 200. The Virginia Supreme Court ignored or overlooked the evidence of Williams' difficult childhood and abuse and his limited mental capacity. It is also unreasonable to characterize the additional evidence as coming from "mostly relatives." As stated, *supra*, Bruce Elliott, a respected professional in the community, and several correctional officers offered to testify on Williams behalf.

Accordingly, the Court finds that Williams was not afforded effective representation at the sentencing stage of his trial. The sentence of death imposed on November 19, 1986 will be vacated, and it will be ordered that Petitioner shall be resentenced pursuant to Virginia Code § 19.2-264.3(C).

4. Alleged failure to bar testimony at sentencing of Drs. Centor and Ryans[8]

Petitioner argues that trial counsel was ineffective in failing to bar the use of Dr. Centor's and Dr. Ryan's expert testimony. In support of his argument, Petitioner asserts that he never gave notice to the Commonwealth that he intended to use expert testimony at sentencing and therefore never "opened the door" to the use of expert testimony by the prosecution. Petition for Writ of Habeas Corpus at 42.

Petitioner relies on Virginia Code § 19.2-264.3:1(G), which provides:

> No statement or disclosure by the defendant made during a competency evaluation performed pursuant to § 19.2-169.1, an evaluation performed pursuant to § 19.2-169.5 to determine sanity at the time of the offense, treatment provided pursuant to § 19.2-169.2 or § 19.2-169.6 or a capital sentencing evaluation performed pursuant to this section, and no evidence derived from any such statements or disclosures may be

[8] Petitioner's Claim I(B)(2).

> introduced against the defendant at the sentencing phase of a capital murder trial for the purpose of proving the aggravating circumstances specified in § 19.2-264.4. Such statements or disclosures shall be admissible in rebuttal only when relevant to issues in mitigation raised by the defense.

The circuit court found that both Ryans' and Centor's opinions on future dangerousness were based on Williams' prior conviction record and not on any statement made to them by Williams, and thus no violation of Va. Code § 19.2-264.3:1(G) occurred. Findings at 23. The circuit court's decision was not based on an unreasonable determination of the facts nor did it involve an unreasonable application of the *Strickland* standard. Accordingly, the Court dismisses this claim.

5. Alleged failure – to conduct meaningful cross-examination of Drs. Centor and Ryans[9]

Petitioner claims that defense counsel's failure to cross-examine Drs. Centor and Ryans in any meaningful way prejudiced Petitioner. In the state court, Petitioner specifically argued that defense counsel should have cross-examined Drs. Centor and Ryans regarding the first report they prepared, which opined that there was a "low probability that [Williams] would commit criminal acts of violence" in the future. Findings at 22-23 (citing Hearing Transcript). The state court found that this claim was without merit because, "had counsel sought to cross-

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[9] Petitioner's Claim I(B)(3).

examine these experts on their initial report, the commonwealth would have pointed out on redirect that the initial report was completed before the experts were aware of Williams' criminal history, giving the Commonwealth the opportunity to recount that history yet again." The state court's finding of adequate performance is not an unreasonable application of the *Strickland* standard. Accordingly, the Court dismisses this claim.[10]

6. Counsel's closing arguments[11]

Petitioner argues that trial counsel was ineffective in focusing on the "horrible" nature of the crime rather than on mitigating factors. The state court found:

> At the penalty phase of the trial, counsel followed a strategy of asking the jury to spare his client's life despite the crimes that he had committed. He argued that Williams had a heart and that he had a conscience. Counsel emphasized to the jury that it was Williams who surrendered himself to the police, and confessed to his crimes. Counsel argued, quite reasonably, that people who admit their wrongs should receive favorable consideration. The jury already was well aware of the crimes that Williams has committed, and the nature of those crimes. Counsel followed a reasonable strategy in confronting those circumstances up front and then arguing for a life sentence, based on the

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[10] The Court notes that Petitioner also raises claims of failure to introduce certain mitigating evidence. These claims are addressed, *supra*, at 19-33.

[11] Petitioner's Claim I(B)(5).

> fact that Williams had confessed to his crimes. Under the circumstances of this case, this Court finds that counsel's arguments . . . were within the range of effective performance.

Findings at 27.

"In considering whether counsel's closing argument was ineffective, we consider the closing statements in their entirety. . . . Furthermore, counsel may make strategic decisions to acknowledge the defendant's culpability and may even concede that the jury would be justified in imposing the death penalty, in order to establish credibility with the jury." *Carter v. Johnson*, 131 F.3d 452 (5th Cir. 1997) (citing *Strickland v. Washington*) (habeas case in which the petitioner claimed that defense counsel demonstrated a "personal antipathy" toward him during their closing arguments in the punishment phase of the trial).

Defense counsel's choice to acknowledge that Williams' crimes were "horrible" could certainly be viewed as a reasonable tactical decision. Accordingly, the state court's decision was a reasonable application of the *Strickland* standard.

7. Jury Instructions[12]

Petitioner claims that counsel unreasonably failed to request a jury instruction designed to ensure that the jury understood the meaning and role of mitigation evidence.

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[12] Petitioner's Claim I(B)(6)

The jury instruction given at trial, No. 14 (Trial Transcript, Joint Appendix, Vol. II at 845), addresses mitigation evidence and is identical to the jury instruction approved by the Fourth Circuit in *Briley v. Bass*, 750 F.2d 1238 (4th Cir. 1984). Accordingly, the Court cannot say that counsel's performance was deficient in failing to request a different instruction on mitigating evidence.

B. Failure to Prove Cause of Death[13]

Upon first examining the dead body of Stone, the local medical examiner opined that the cause of death was natural, either heart failure or alcohol poisoning. He testified that his opinion was "somewhat [a] guess because there was no autopsy." Almost six months later, Stone's body was exhumed and a regional medical examiner conducted an autopsy. At trial, the regional medical examiner opined that Stone's death was caused by being struck in the chest with blunt force. Petitioner argues that this evidence does not provide competent proof of the cause of death.

On direct appeal, the Supreme Court of Virginia held that the corpus delicti was adequately established as to the cause of death. *Williams v. Commonwealth*, 360 S.E.2d 361, 366 (Va. 1987). "The alleged conflict in the testimony of these two experts was a matter for the jury to resolve. . . . No litigant is bound by contradicted testimony of a witness even though proffered by the litigant. The jury must resolve any conflict between the witnesses." *Id.* (citing *Travis v. Bulifant*, 306 S.E.2d 865, 866

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[13] Petitioner's Claim II(A).

(Va. 1983); *Opanowich v. Commonwealth*, 83 S.E.2d 432, 440 (Va. 1954); *Massie v. Firmstone*, 114 S.E. 652, 656 (Va. 1922)).

The Court further notes that Williams' confession was an important piece of evidence in the murder case. When a defendant has fully confessed a crime, "only slight corroborative evidence is necessary to establish the corpus delicti." *Clozza v. Commonwealth*, 321 S.E.2d 273, 279 (Va. 1984).

Since the Court may not disturb the Virginia Supreme Court's interpretation of Virginia law, the Court may only determine whether the evidence as characterized by the Virginia court represents "an unreasonable determination of the facts in light of evidence presented in the state court proceeding." *See* 28 U.S.C. § 2254(d)(2). The Court holds that the Virginia Supreme Court reasonably determined the facts and that those facts are sufficient to allow a reasonable trier of fact to determine the cause of death.

D. Failure to Prove the Robbery[14]

The Virginia Supreme Court found that there was sufficient evidence of the robbery. Shortly after Stone's body was discovered fully clothed, the wallet was found to be missing from the rear pants pocket. The police thoroughly searched the house, but the wallet was never found. Stone's daughter testified, "I knew it was something he didn't do was take his wallet out of his pocket.

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[14] Petitioner's Claim II(B).

Even when he would go to bed at night he would take his pants off and hang them on the foot of the bed, but his pants pocket would still be fastened . . . [w]ith his wallet." *Williams*, 360 S.E.2d at 366. "This evidence, coupled with Williams' confession that he took the wallet from the decedent's pocket after killing him, removed some money, and then threw the wallet into a river, corroborates the corpus delicti of the robbery." *Id.* Again, the Court holds that the Virginia Supreme Court reasonably determined the facts and that those facts are sufficient to allow a reasonable trier of fact to find Williams guilty of the robbery of Stone.

E. Admission of Petitioner's Statements to Police[15]

Petitioner claims that his statements to the police were not voluntarily made. Williams actually initiated contact with the police with regards to the Stone case. When incarcerated on another charge, Williams wrote a letter to the chief of police confessing to the murder of "that man Who Die on Henry St." Williams was subsequently interviewed, after he told police that his conscience was bothering him and he wanted to talk to somebody. He offered both a taped and a written statement. After giving these statements, he spoke with his mother. His mother apparently told him that he "had no blood on him" and that he couldn't have murdered Stone. Williams then attempted to recant his statements, saying that they were just dreams that he had had. Williams suggests that he was very troubled by these dreams and

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[15] Petitioner's Claim III.

that he just wanted "help." He argues that he was coerced into confessing by the promise that he would receive psychological help. Williams also argues that his various confessions are internally inconsistent, and that his questioners "suggested" details to him which he then incorporated into his confessions.

The Virginia Supreme Court upheld the trial court's finding that Williams' confessions were voluntary and that he was competent to make statements to the police, and rejected the argument that police induced the confession by promise of reward. The state court's ruling is neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent, and federal relief is therefore prohibited.

F. Evidence Concerning the Stroud Conviction[16]

Petitioner claims that introduction of evidence concerning a brutal assault on an elderly woman by Williams shortly after Stone's murder that resulted in a malicious wounding conviction "served only to inflame the passion of the jury such that the decision to impose the death sentence was based on caprice or emotion rather than reason in violation of petitioner's rights under the Eighth and Fourteenth Amendments." Petition for Habeas Corpus at 86.

The Virginia Supreme Court held that the details of that malicious wounding were highly relevant in assessing Williams' "future dangerousness." The Virginia

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[16] Petitioner's Claim IV.

Supreme Court cited Va. Code § 19.2-264.4(B), stating, "We have construed this statute to authorize the introduction of the *details* of other criminal conduct." *Williams*, 360 S.E.2d at 370 (emphasis added).

This Court may not disturb the Virginia Court's interpretation of Virginia law, and finds that the Virginia Supreme Court reasonably determined the facts with regard to this claim.

G. Claims Concerning the Prosecutor's Arguments[17]

Petitioner claims that his sentence of death was imposed after consideration of an improper argument by the prosecutor. Specifically, the prosecution was allowed to argue at sentencing, over objection, that Petitioner's "not guilty" plea evinced a lack of remorse for the crime so as to justify the imposition of the death penalty. Petition for Habeas Corpus at 89. The Virginia Supreme Court found that the prosecution's argument should not have been permitted, but that it did not prejudice the defendant's status before the jury. *Williams*, 360 S.E.2d at 369. "At most it was an effort to capitalize on the allegedly inconsistent positions taken by defense counsel. We believe the jury understood this as 'lawyer talk' and had the common sense to treat it as such." *Id.* Again, this Court cannot address the Virginia state law issue[18], and

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[17] Petitioner's Claim V.

[18] In his state petition, Williams also asserted this claim as a violation of his federal constitutional rights. The state court's ruling that this claim was defaulted under *Slayton v. Parrigan* precludes federal relief.

holds that the Virginia Supreme Court reasonably determined the facts.

Petitioner also argues that the prosecutor improperly argued before the trial court at the sentencing hearing that Williams' plea of not guilty was also a denial of his confession, indicating a continued lack of remorse. The Virginia Supreme court held that "a plea of not guilty also contests the validity and admissibility of a confession." *Id.* at 369. The Court noted also that the argument was before the court and not the jury. "A trial judge is uniquely capable because of his training, experience and judicial discipline to disregard potentially prejudicial argument during the mental process of adjudication. . . . We must assume that the trial judge did not penalize Williams because he pled not guilty and denied his confession in the suppression hearing, but merely considered those matters as evidence of Williams' recent attitude about this crime and his other criminal activities." *Id.* With regards to the prosecutor's argument before the judge, this Court also holds that the Virginia Supreme Court reasonably determined the facts.

H. Argument on the Meaning of a Life Sentence[19]

Finally, Petitioner Claims that the trial court's refusal to permit defense counsel to argue to the jury in the sentencing phase of the proceedings the meaning of a life sentence violated his due process rights under the Fourteenth Amendment and right not to be sentenced to death arbitrarily under the Eighth Amendment. Petitioner for

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[19] Petitioner's Claim VI.

Habeas Corpus at 94. Specifically, defense counsel attempted to argue that a life sentence meant Williams would be "away from the public for the rest of his life." Trial Transcript at 681. The Commonwealth's Attorney objected to the argument because under Virginia law Williams would have been parole eligible in approximately twelve and a half years. *Id.* at 682. The trial court sustained the objection. *Id.* at 683. Petitioner raised this issue on direct appeal only as a matter of state law. The Virginia Supreme Court ruled that "[i]f the jury is not to be concerned with what may later happen to a defendant sentenced to the penitentiary, no inference can be drawn or argued one way or the other as to whether he will serve his full term." *Williams*, 360 S.E.2d 368. The court stated that this type of argument is improper in the same way as permitting the Commonwealth to argue possible parole release as a means to increase the defendant's sentence is improper. *Id.* "A reduced sentence is not the responsibility of the judiciary but of the executive department." *Id.* The Supreme Court's ruling on the state law issue presented is conclusive, and Petitioner does not argue that the Court made any mistake of fact. Accordingly, relief on this claim is denied.

Conclusion.

For the reasons set forth above, William's Petition for Writ of Habeas Corpus is GRANTED in part and DENIED in part. The sentence of death imposed on November 19, 1986 will be vacated, and it will be ordered that the Petitioner shall be resentenced pursuant to Virginia Code § 19.2-264.3(C).

Also, for these reasons, the Court finds that Petitioner's Motions for Discovery, Appointment of Experts, and to Transfer Petitioner for Medical Evaluation are not warranted and, accordingly, are DENIED.

/s/ James C. Cacheris
United States District Judge

April 7th 1998
Alexandria, Virginia

163 F.3d 860

Terry WILLIAMS, Petitioner-Appellee,

v.

John TAYLOR, Warden, Sussex I State Prison,
Respondent-Appellant.
Terry Williams, Petitioner-Appellant,

v.

John Taylor, Warden, Sussex I State Prison,
Respondent-Appellee.

Nos. 98-14, 98-16.

United States Court of Appeals,
Fourth Circuit.

Argued Sept. 24, 1998.

Decided Dec. 18, 1998.

ARGUED: Robert Quentin Harris, Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellant. Ellen O. Boardman, O'Donoghue & O'Donoghue, Washington, D.C., for Appellee. ON BRIEF: Mark L. Earley, Attorney General of Virginia, Office of the Attorney General, Richmond, Virginia, for Appellant. Brian A. Powers, Dinah S. Leventhal, O'Donoghue & O'Donoghue, Washington, D.C., for Appellee.

Before WIDENER, WILLIAMS, and MICHAEL, Circuit Judges.

Affirmed in part and reversed in part by published opinion. Judge WILLIAMS wrote the opinion, in which Judge WIDNER and Judge MICHAEL joined.

OPINION

WILLIAMS, Circuit Judge:

On September 30, 1986, a Virginia jury convicted Terry Williams of the capital murder of Harris Thomas Stone. Following the jury's determination that Williams presented a future danger to society, the trial court sentenced Williams to death. After exhausting all available state remedies, Williams petitioned the United States District Court for the Eastern District of Virginia for habeas corpus relief. *See* 28 U.S.C.A. § 2254 (West Supp.1998). The district court ordered that the writ be granted on the ground that Williams's trial counsel were ineffective because they failed to present certain evidence in mitigation of punishment during the sentencing phase of Williams's trial. The remaining allegations in Williams's habeas petition were dismissed.

On appeal, the Commonwealth contends that the writ was erroneously granted.[1] We agree. The Virginia Supreme Court's conclusion that Williams's trial counsel were not ineffective during the sentencing phase of Williams's trial was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent. As a result, Williams is not entitled to habeas relief

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[1] Williams named Sam Pruett, Warden of the Mecklenburg Correctional Center, as Respondent in his petition. When Fred W. Greene replaced Pruett as Warden, Greene was substituted for Pruett as Respondent. Thereafter, Williams was transferred to the Sussex I State Prison. As a result, John Taylor, Warden of the Sussex I State Prison, was substituted for Greene as Respondent. Because of the numerous changes, we refer to Respondent as "the Commonwealth" throughout this opinion.

under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[2] *See* 28 U.S.C.A. § 2254(d) (West Supp.1998). Moreover, we conclude that none of the claims raised in Williams's cross-appeal provide a basis for federal habeas relief. Accordingly, we affirm in part and reverse in part.

I.

As recited by the Virginia Supreme Court, the undisputed facts are as follows:

> Stone, an elderly man who resided on Henry Street in Danville, was found dead in his bed shortly before 2:00 a.m. Sunday, November 3, 1985. There was no sign of a struggle, no blood was observed on Stone's body, and he was fully clothed. Despite a diligent search, Stone's wallet, which he customarily kept fastened in the back pocket of his pants, was never found.
>
> The local medical examiner, who examined the body [at] about 9:30 that Sunday morning, noted an abrasion on the chest, but no bruising. Stone's history of heart disease and the police

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[2] Williams filed his petition for a writ of habeas corpus on December 12, 1997, more than one year after the enactment of the AEDPA. *See* Pub.L. No. 104-132, 110 Stat. 1214 (enacted on April 24, 1996). As a result, § 104 of the AEDPA, which amended 28 U.S.C.A. § 2254(d) (West Supp.1998), applies to this appeal. *See Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2067-68, 138 L.Ed.2d 481 (1997) (holding that the new habeas standards of review do not apply to habeas petitions pending in federal court prior to the enactment of the AEDPA); *Green v. French*, 143 F.3d 865, 868 (4th Cir.1998) (applying AEDPA to capital habeas petition filed after the enactment of the AEDPA).

failure to report anything suspicious about the circumstances of Stone's death led the local medical examiner to conclude that Stone's death was due to heart failure. However, when Stone's blood alcohol content was later analyzed and was reported to be 0.41%, the regional medical examiner's office in Roanoke amended the finding of the cause of death to alcohol poisoning. Stone's daughter testified Stone looked "a little high" when she last saw him entering his house shortly after 6:00 p.m. on Saturday, November 2, 1985.

When the funeral director, Jack Miller, observed Stone's body on Monday morning, he called a bruise or abrasion over the left ribs to the attention of the police. The police told Miller that the local medical examiner believed the bruise was an old one. Though Miller disagreed with the local medical examiner, on instructions from the police he embalmed the body.

Almost six months later, the chief of police in Danville received an anonymous letter from an inmate of the local jail in which the author admitted killing "that man Who Die on Henry St." The police interviewed Williams, an inmate of the Danville jail at the time, who eventually admitted that he had written the letter and later gave multiple confessions to the murder and robbery of Stone. Williams said he had first struck Stone in the chest, and later on his back, with a mattock and had removed three dollars from Stone's wallet.

Stone's body was exhumed. On July 2, 1986 Dr. David Oxley, a forensic pathologist and Deputy Chief Medical Examiner for Western Virginia, performed an autopsy. When Dr. Oxley opened

> the body, he found Stone's fourth and fifth ribs on the left side had been fractured and displaced inward, puncturing the left lung and depositing a quantity of blood in the left chest cavity.

Williams v. Commonwealth, 234 Va. 168, 360 S.E.2d 361, 363-64 (Va.1987).

After a jury trial in the Circuit Court of the City of Danville, Virginia, Williams was convicted of the capital murder of Mr. Stone. Based on its finding of future dangerousness, *see* Va.Code Ann. § 19.2-264.4(c) (Michie Supp.1998), the jury recommended that Williams be sentenced to death. Following the jury's recommendation, the trial court sentenced Williams to death. On direct appeal, the Virginia Supreme Court affirmed Williams's conviction and death sentence. *See Williams*, 360 S.E.2d at 363-64. The United States Supreme Court denied Williams's petition for a writ of certiorari. *See Williams v. Virginia*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

Williams filed a habeas corpus petition in the Danville Circuit Court on August 26, 1988. After a hearing, the Danville Circuit Court dismissed the majority of Williams's claims. Almost seven years later, Williams amended his habeas petition to include several claims that his trial counsel were ineffective. In June 1995, the Danville Circuit Court held an evidentiary hearing on the issue of ineffective assistance of trial counsel.

Prior to any action on the hearing, however, jurisdiction over the habeas petition was transferred to the Virginia Supreme Court. *See* Va.Code Ann. § 8.01-654(C)(1)

(Michie Supp.1998) (providing that the Virginia Supreme Court has "exclusive jurisdiction" to consider writs of habeas corpus with respect to prisoners under a death sentence). By order dated May 6, 1996, the Virginia Supreme Court directed the Danville Circuit Court to report its findings of fact and conclusions of law relating to the ineffective assistance of counsel claims addressed at the June 1995 evidentiary hearing. *See id.* (providing that the circuit court that entered the sentence of death may conduct an evidentiary hearing "only if directed to do so by order of the Supreme Court").

On August 15, 1996, the Danville Circuit Court forwarded its Findings of Fact and Recommended Conclusions of Law (the Report) to the Virginia Supreme Court. The Danville Circuit Court found that trial counsel's "performance at the guilt phase of the trial was both professional and competent." (J.A. at 1055.) Of particular importance here, the Danville Circuit Court concluded that trial counsel properly handled the court-appointed mental health experts, and that lead trial counsel, E.L. Motley, was not suffering from a mental impairment during the course of his representation of Williams.

The Danville Circuit Court did conclude, however, that trial counsel's failure to present certain mitigating evidence during the sentencing phase of the trial warranted relief. Specifically, the Danville Circuit Court found that trial counsel failed to investigate and present (1) Williams's juvenile commitment records from the Beaumont Correctional Center, (2) records, including statements from Williams's siblings, that provided a summary of Williams's early home life, (3) the testimony of Williams's estranged wife and eleven-year-old daughter,

and (4) the testimony of Williams's friend Bruce Elliot. According to the Report, had this evidence been developed and presented at the sentencing phase of Williams's trial, the jury would have learned that Williams "had a deprived and abused upbringing; that he may have been a neglected and mistreated child; that he came from an alcoholic family; and that he was borderline mentally retarded." (J.A. at 1059-60). Continuing, the Report stated that the evidence in question would have shown that Williams's "conduct had been good in certain structured settings in his life (such as when he was incarcerated) and . . . that he had redeeming qualities." (J.A. at 1060.) In summary, the Danville Circuit Court found that the mitigating evidence probably would have been given weight by at least one member of the jury. Because one juror would have been the difference between life and death, the Report ultimately concluded that Williams was prejudiced by trial counsel's failure to make use of the mitigating evidence.

Both the Commonwealth and Williams filed objections to the Report. The Commonwealth argued that trial counsel were not ineffective during the sentencing phase of Williams's trial for making a tactical decision not to introduce evidence that was just as likely to operate to Williams's disadvantage. Williams, in contrast, argued that the Danville Circuit Court erred in finding that his trial counsel were effective during the guilt phase of his trial. On January 13, 1997, the Virginia Supreme Court ordered briefing and argument on the one issue that the Danville Circuit Court found warranted relief, and adopted the Danville Circuit Court's recommendation that the other claims be dismissed.

On June 6, 1997, the Virginia Supreme Court unanimously rejected the Danville Circuit Court's finding that trial counsel's failure to present certain mitigating evidence during the sentencing phase warranted relief. *See Williams v. Warden*, 487 S.E.2d 194 (Va.1997). In so holding, the Virginia Supreme Court reviewed Williams's ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), and, to a lesser extent, *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838 (1993). After assuming that Williams's trial counsel's performance was deficient, the Virginia Supreme Court concluded that Williams failed to demonstrate prejudice.

On December 12, 1997, Williams filed a habeas corpus petition pursuant to 28 U.S.C.A. § 2254 in the United States District Court for the Eastern District of Virginia. In his petition Williams argued, among other things, that his counsel were ineffective in several respects. On April 7, 1998, the district court ordered that the writ be granted on the ground that Williams's trial counsel were ineffective for failing to present evidence in mitigation of punishment during the sentencing phase of Williams's trial. In so ruling, the district court specifically concluded that the Virginia Supreme Court's application of *Strickland* and Lockhart was unreasonable. The remaining allegations in Williams's habeas petition were dismissed.

On appeal, the Commonwealth contends that the district court erred in granting Williams federal habeas relief. In particular, the Commonwealth argues that the Virginia Supreme Court's conclusion that Williams's trial counsel were not ineffective was neither contrary to, nor an unreasonable application of, clearly established

Supreme Court precedent. In his cross-appeal, Williams contends: (1) that his lead trial counsel's mental illness rendered his assistance constitutionally ineffective, and (2) that his trial counsel's failure to handle properly several matters related to his court-appointed mental health experts rendered their assistance constitutionally ineffective. We address the Commonwealth's and Williams's arguments in turn.

II.

Before we address the merits of either the Commonwealth's appeal or Williams's cross-appeal, we must first determine the applicable standard of review. The Antiterrorism and Effective Death Penalty Act of 1996 provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d) (West Supp.1998). We recently interpreted subsection (1) to prohibit the issuance of the writ unless (a) the state court decision is in "square conflict"

with Supreme Court precedent that is controlling as to law and fact or (b) if no such controlling decision exists, "the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant [S]upreme [C]ourt precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts." *Green v. French*, 143 F.3d 865, 870 (4th Cir.1998). "In other words, habeas relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable." *Id.*

Williams contends, however, that we erroneously construed § 2254 in *Green v. French*.[3] Thus, Williams argues that the standard of review adopted in that case should not be followed here. This argument need not detain us long. "It is well established that a decision of this Court is binding on other panels unless it is overruled by a subsequent en banc opinion of the Court or an intervening decision of the United States Supreme Court." *Smith v. Moore*, 137 F.3d 808, 821(4th Cir.) (citing Industrial *Turnaround Corp. v. NLRB*, 115 F.3d 248, 254 (4th Cir.1997)), *cert. denied*, 119 S.Ct. 199 (1998). Neither the en banc Court nor the United States Supreme Court

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[3] Williams also contends, albeit in a cursory fashion, that the *Green v. French* standard of review violates both the Suspension Clause and Article III of the Constitution. To the extent these claims are properly before us, *see Canady v. Crestar Mortgage Corp.*, 109 F.3d 969, 973 (4th Cir.1997) (holding that issues not fully briefed are deemed waived on appeal), the identical claims were raised and rejected in *Green v. French*, 143 F.3d 865, 874-76 (4th Cir.1998).

has overruled (or even called into question) the standard of review adopted by this Court in *Green v. French*. Indeed, since *Green v. French* was decided, we have applied the new standard in *Fitzgerald v. Greene*, 150 F.3d 357, 362 (4th Cir.1998), *Wright v. Angelone*, 151 F.3d 151, 156 (4th Cir.1998), and *Cardwell v. Greene*, 152 F.3d 331, 339 (4th Cir.1998). As a consequence, the standard of review enunciated in *Green v. French* continues to be the binding law of this Circuit.

III.

Although the Virginia Supreme Court unanimously found that Williams's trial counsel were not ineffective, *see Williams v. Warden*, 487 S.E.2d 194, 200 (Va.1997), the district court concluded that the Virginia Supreme Court unreasonably applied *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838 (1993), in finding no prejudice. In addition, the district court found that the Virginia Supreme Court "made an error of fact in discussing its finding of no prejudice." (J.A. at 1102.) Finding that Williams's trial counsel were constitutionally ineffective for failing to investigate, prepare, and present certain evidence in mitigation of punishment during the sentencing phase of Williams's trial, the district court ordered that the writ be granted.[4] In contrast to the district court,

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[4] The district court identified the same allegedly mitigating evidence cited by the Danville Circuit Court: (1) Williams's juvenile commitment records from the Beaumont Correctional Center, (2) records, including statements from Williams's siblings, that provided a summary of Williams's early home life,

we conclude that the Virginia Supreme Court's finding of no prejudice was neither based on an unreasonable application of the tests set forth by the United States Supreme Court in *Strickland* and Lockhart for determining prejudice, nor based on an unreasonable determination of the facts in light of the evidence presented at the evidentiary hearing held by the Danville Circuit Court.

A.

In *Strickland*, the Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel. *See Strickland*, 466 U.S. at 690. First, Williams must demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. *See id.* at 687-91, 104 S.Ct. 2052. This, however, is no simple task. A court's review of counsel's performance is "highly deferential." *Id.* at 689, 104 S.Ct. 2052. Indeed, courts must afford a strong presumption that counsel's performance was within the wide range of professionally competent assistance. *See id.* If Williams is able to demonstrate that his trial counsel's performances were objectively unreasonable, he must then "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

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(3) the testimony of Williams's estranged wife and eleven-year-old daughter, and (4) the testimony of Williams's friend Bruce Elliot. In addition, the district court identified Williams's prison commendations for returning a guard's wallet and for identifying members of a prison drug gang. The Danville Circuit Court attached no significance to Williams's prison commendations.

Id. at 694, 104 S.Ct. 2052. As a result, Williams's trial counsel may be deemed ineffective only if their "conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S.Ct. 2052.

In Lockhart, the Supreme Court clarified the meaning of prejudice under *Strickland*. *See Lockhart*, 506 U.S. at 369-70, 113 S.Ct. 838. Although the Supreme Court in *Strickland* focused primarily on whether "the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052, the Supreme Court in Lockhart clarified that "an analysis focusing solely on mere outcome determination . . . is defective," *Lockhart*, 506 U.S. at 369. Instead, a proper prejudice analysis must consider "whether the result of the proceeding was fundamentally unfair or unreliable." *Id.* As a result, a court may not "set aside a conviction or sentence solely because the outcome would have been different but for counsel's error." *Id.* at 369-70, 113 S.Ct. 838.

The Virginia Supreme Court assumed, without deciding, that Williams's trial counsel's performance fell below an objective standard of reasonableness. *See Williams v. Warden*, 487 S.E.2d 194, 198 (Va.1997) (concluding that it was "easier to dispose of [Williams's] ineffectiveness claim on the ground of lack of sufficient prejudice"). The district court, however, concluded that Williams's trial counsel were, in fact, deficient. Like the Virginia Supreme Court, we will assume, without deciding, that Williams's trial counsel were objectively unreasonable in failing to investigate, prepare, and present certain evidence in mitigation of punishment during the sentencing phase of Williams's trial. Despite assuming that Williams's trial

counsel were objectively unreasonable in failing to introduce the evidence in question, we cannot say that the Virginia Supreme Court's decision that Williams was not prejudiced thereby was an unreasonable application of the tests developed in either *Strickland* or *Lockhart* for determining prejudice. The Virginia Supreme Court's analysis on this point is as follows:

> [Williams's argument] flies in the face of the Supreme Court's admonition in *Lockhart*, [506 U.S. at 364, 113 S.Ct. 838], that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective."
>
> We shall demonstrate that the criminal proceeding sentencing defendant to death was not fundamentally unfair or unreliable, and that the prisoner's assertions about the potential effects of the omitted proof do not establish a "reasonable probability" that the result of the proceeding would have been different, nor any probability sufficient to undermine confidence in the outcome. Therefore, any ineffective assistance of counsel did not result in actual prejudice to the accused. The jury was presented with the murder of an intoxicated, elderly person in his own bedroom committed by a 31-year-old man. The murder weapon was a tool customarily used to dig stumps. At the time, defendant had been out of the penitentiary for only seven months, released on parole for convictions of burglary and grand larceny.
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> The accused was in the midst of a crime spree, preying upon defenseless individuals. Following commission of these crimes of murder and

robbery in November 1985, the defendant savagely beat an elderly woman about her head in March 1986, leaving her lying in the street unconscious with multiple injuries. At the time of trial, she was in a nursing home "vegetating" from a brain injury with no hope of recovery.

Upon being questioned in April and May 1986 about the November 1985 crimes, the defendant admitted to the recent theft of two motor vehicles. He also admitted setting fire to clothes on the porch of a residence late one night in December 1985, luring the occupant outside, and stabbing him with a knife in order to rob him. The accused later was convicted of the vehicle thefts and, at the time of trial for the present crimes, had been convicted of an arson that took place in the city jail.

While held in jail on the present offenses, he related to a police officer "that he wanted to just choke some of the guys in the jail cell, and one day some had gone to the library and one guy was laying on the bed, and he got the urge to just go over and choke him. Another time he was playing cards and he thought he could just hit someone and break that person's jaw without him ever knowing what hit him."

The jury also heard that defendant had served time in the penitentiary for an armed robbery committed when he was about 20 years old. The jury did not know of 14 criminal offenses committed by defendant from 1966 to 1975.

Drawing on *Strickland*, we hold that, even assuming the challenged conduct of counsel was unreasonable, the prisoner "suffered insufficient prejudice to warrant setting aside his death sentence," 466 U.S. at 698-99, 104 S.Ct. 2052 the

> predicate of which was that there is a probability that he would commit criminal acts of violence which would constitute a continuing serious threat to society. The mitigation evidence that the prisoner says, in retrospect, his trial counsel should have discovered and offered barely would have altered the profile of this defendant that was presented to the jury. At most, this evidence would have shown that numerous people, mostly relatives, thought that defendant was nonviolent and could cope very well in a structured environment. Of course, those assumptions are belied by the four-month crime spree beginning with the present crimes and by the defendant's current attitude while in jail toward other inmates.
>
> What the Supreme Court said in *Strickland* applies with full force here: "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." 466 U.S. at 700, 104 S.Ct. 2052. Indeed, disclosure of the defendant's juvenile history might even have been harmful to his case.

Williams v. Warden, 487 S.E.2d 194, 199-200 (Va.1997).

According to the district court, the Virginia Supreme Court's application of the *Strickland* prejudice standard was unreasonable because there was a reasonable probability that at least one juror would have concluded that the death penalty was not warranted had the evidence in question been presented. (J.A. at 1099 (noting that

Va.Code Ann.§ 19.2-264.4(E)) provides that a death sentence must be unanimous). For the reasons that follow, we disagree.

To the extent the district court suggests that a capital defendant faces a less rigorous standard for determining prejudice than a noncapital defendant, it is simply mistaken. A court may not assume that one juror may be more likely swayed by mitigating evidence than his fellow jurors. *See Strickland*, 466 U.S. at 695, 104 S.Ct. 2052(noting that a finding of prejudice does not "depend on the idiosyncrasies of the particular decision maker, such as unusual propensities toward harshness or leniency"). Rather, the *Strickland* prejudice standard assumes twelve reasonable, conscientious, and impartial jurors. Thus, that one hypothetical juror might be swayed by a particular piece of evidence is insufficient to establish prejudice.

Like the Virginia Supreme Court, we readily conclude that Williams was not prejudiced in any way by counsel's actions. Evidence that Williams presented a future danger to society was simply overwhelming. The murder of Mr. Stone was just one act in a crime spree that lasted most of Williams's life. Indeed, the jury heard evidence that, in the months following the murder of Mr. Stone, Williams savagely beat an elderly woman, stole two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, and confessed to having strong urges to choke other inmates and to break a fellow prisoner's jaw. Because a significant portion of the allegedly mitigating evidence also painted Williams as a recidivist who was likely to commit future offenses, the Virginia Supreme Court's conclusion that there was not

"a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694, 104 S.Ct. 2052 was not unreasonable.

The district court also concluded that the Virginia Supreme Court's application of *Lockhart* was unreasonable. Specifically, the district court held that the prejudice standard developed in *Lockhart* applies only in " 'the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not to inform the inquiry.' " (J.A. at 1101 (quoting *Lockhart*, 506 U.S. at 373) (O'Connor, J., concurring)). Because Williams sought to demonstrate prejudice based on trial counsel's failure to present mitigating evidence, which, by current law, Williams was entitled to put before the sentencing jury, the district court determined that the standard developed in *Lockhart* was inapplicable.

The district court, we believe, construed *Lockhart* far too narrowly. Although Justice O'Connor would limit the prejudice analysis contained in *Lockhart* to the "unusual" case, Chief Justice Rehnquist, writing for the majority, made no such disclaimer. Indeed, as the *Lockhart* majority made clear, the requirement that a criminal defendant alleging prejudice show that the result of the proceeding was unfair or unreliable was the rule, not the exception. *See Lockhart*, 506 U.S. at 369, 113 S.Ct. 838. In fact, the Supreme Court in *Strickland* concluded its analysis by noting that the defendant "made no showing that . . . his sentence was rendered unreliable," or that his "sentencing proceeding was . . . fundamentally unfair." *Strickland*, 466 U.S. at 700, 104 S.Ct. 2052. Thus, *Lockhart*'s emphasis

on reliability and a fair trial simply clarified the meaning of prejudice under *Strickland*. *Accord United States v. Prince*, 110 F.3d 921, 925 (2d Cir.) (noting that " 'analysis focusing solely on mere outcome determination . . . is defective' " (quoting *Lockhart*, 506 U.S. at 368, 113 S.Ct. 838)), *cert. denied*, ___ U.S. ___, 118 S.Ct. 188, 139 L.Ed.2d 127 (1997); *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir.1996) (stating that the Supreme Court in *Lockhart* clarified the meaning of prejudice), *cert. denied*, 117 S.Ct. 2422 (1997); *Hays v. Alabama*, 85 F.3d 1492, 1496 (11th Cir.1996) (stating that prejudice requires a showing that counsel's errors deprived the defendant of a fair trial), *cert.denied*, ___ U.S. ___, 117 S.Ct. 1262, 137 L.Ed.2d 341 (1997); *United States v. Kissick*, 69 F.3d 1048, 1055 (10th Cir.1995) (noting that a criminal defendant must demonstrate that counsel's performance rendered the proceeding "fundamentally unfair or unreliable" to show prejudice); *Flamer v. Delaware*, 68 F.3d 710, 728 (3d Cir.1995) (noting that Lockhart's fundamentally unfair or unreliable standard "clarified the meaning of prejudice under *Strickland*").

In sum, the district court erred in construing *Lockhart* based solely on Justice O'Connor's concurring opinion. The holding in *Lockhart* – that a criminal defendant must show that counsel's performance rendered the proceeding fundamentally unfair or unreliable to establish prejudice – is not limited to the "unusual" case. Indeed, the standard for prejudice set forth in *Lockhart* is not an exception to the *Strickland* standard, but rather a clarification. We note that the Virginia Supreme Court's application of *Lockhart* was consistent with how our sister circuits have applied the decision, and we cannot say that the Virginia Supreme Court's reliance on *Lockhart*, in

addition to *Strickland*, rendered its ineffective assistance of counsel analysis unreasonable under § 2254(d).

Finally, Williams contends that the Virginia Supreme Court erroneously applied a "weighing" analysis from *Strickland* in finding no prejudice. Williams's argument is based on the following passage from the Virginia Supreme Court's opinion:

> What the Supreme Court said in *Strickland* applies with full force here: "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed."

Williams, 487 S.E.2d at 200 (quoting *Strickland*, 466 U.S. at 700), 104 S.Ct. 2052. For the reasons that follow, we conclude that the Virginia Supreme Court reasonably applied "clearly established federal law, as determined by the Supreme Court of the United States," 28 U.S.C.A. § 2254(d)(1), in rejecting Williams's ineffective assistance of counsel claims.

When a death sentence is supported by an invalid aggravating factor, whether the sentence of death may stand turns on whether the jury was required to "weigh" the aggravating circumstances against the mitigating circumstances. *See Stringer v. Black*, 503 U.S. 222, 232, 112 S.Ct. 1130, 117 L.Ed.2d 367(1992) (noting that in a non-weighing state the jury's reliance on an invalid aggravating factor may not "infect the formal process of deciding whether death is an appropriate penalty so long as the

sentencing body finds at least one valid aggravating factor"). As a result,the term "weighing state" has become a term of art in capital cases. *See Clemons v. Mississippi*, 494 U.S. 738, 752, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). Florida, for example, is a weighing state, *see Parker v. Dugger*, 498 U.S. 308, 318, 111 S.Ct. 731, 112 L.Ed.2d 812(1991), while Virginia is not, *see Tuggle v. Netherland*, 79 F.3d 1386, 1389 (4th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 237, 136 L.Ed.2d 166 (1996). Because *Strickland* involved a Florida defendant, Williams argues that only in a "weighing state" may prejudice be determined by considering whether the aggravating evidence outweighed the mitigating evidence. We find this argument to be without merit.

First, there is no evidence that any portion of the Supreme Court's prejudice analysis in *Strickland* was meant to apply only to "weighing states," like Florida. Rather, we believe that the Supreme Court used the term "outweighed" in its ordinary sense. Indeed, the term "weighing" did not become a term of art until six years after *Strickland* was decided. *See Clemons*, 494 U.S. at 738, 110 S.Ct. 1441 (applying "weighing" as term of art in 1990). Second, this Court used the identical quotation from *Strickland* in rejecting a South Carolina defendant's claim of prejudice in a capital case, *see Plath v. Moore*, 130 F.3d 595, 602 (4th Cir.1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1854, 140 L.Ed.2d 1102 (1998), and South Carolina, like Virginia, is not a weighing state, *see Smith v. Moore*, 137 F.3d 808, 815 (4th Cir.), *cert. denied*, ___ U.S. ___, 119 S.Ct. 199, 142 L.Ed.2d 163 (1998). In fact, this Court recently used the identical quotation from *Strickland* in rejecting a Virginia defendant's claim of prejudice in a

capital case. *See Fitzgerald v. Greene*, 150 F.3d 357, 368 (4th Cir.1998) (noting that "[i]n the context of challenging a death sentence, 'the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death' " (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052)). Based upon the foregoing, we cannot say that the Supreme Court of Virginia's rejection of Williams's claim was an unreasonable application of *Strickland*.

B.

The district court also concluded that the Virginia Supreme Court "made an error of fact in discussing its finding of no prejudice." (J.A. at 1102.) Specifically, the district court took exception with the Virginia Supreme Court's characterization of the allegedly mitigating evidence as "mostly relatives, [who] thought the defendant was nonviolent and could cope well in a structured environment." *Williams*, 487 S.E.2d at 200. The district court criticized the Virginia Supreme Court for failing to mention the possible testimony of Williams's friend Bruce Elliot and several state correctional officers, and for overlooking evidence dealing with Williams's difficult childhood and limited mental capacity.

Despite the contentions of the district court to the contrary, the Virginia Supreme Court accurately described the omitted mitigation evidence that was credited by the Danville Circuit Court after the two-day evidentiary hearing. The Danville Circuit Court only identified Williams's estranged wife, daughter, siblings,

mother, and friend Bruce Elliot as possible witnesses whose testimony "was worthy of a jury's consideration." (J.A. at 1060). Thus, the Virginia Supreme Court's description of the witnesses as "mostly family members" was reasonable.[5] Moreover, the Virginia Supreme Court's description of the nature of their testimony was also reasonable. The affidavits of Williams's family members attempt to portray him as nonviolent. Similarly, Williams's friend Bruce Elliot described Williams as nonviolent, proud of his accomplishments, and able to thrive in a structured environment. Because the Virginia Supreme Court's decision was not based on an unreasonable determination of the facts in light of the evidence presented at the evidentiary hearing held by the Danville Circuit Court, the district court erred in granting the writ. *See* 28 U.S.C.A. § 2254(d)(2) (West Supp.1998).

IV.

In his cross-appeal, Williams contends that his trial counsel were ineffective in several respects. First,

---

[5] In an effort to prove that the witnesses who could have testified at Williams's sentencing hearing were not "mostly relatives," counsel for Williams provided this Court, pursuant to Local Rule 28(f) and Fed. R.App. P. 28(j), with the names of fifteen potential witnesses, only seven of whom were relatives of Williams. Despite counsel's efforts, we note that the Danville Circuit Court identified (at most) six omitted witnesses, only one of whom was not a relative. The overwhelming majority of nonrelative witnesses listed by counsel were never identified, much less credited, by the Danville Circuit Court. Accordingly, it comes as no surprise that the Virginia Supreme Court failed to consider those witnesses.

Williams argues that his lead trial counsel was mentally ill. Second, Williams argues that his trial counsel mishandled several matters related to his court-appointed mental health experts. We address these arguments in turn.

A.

Almost one year after Williams's trial, his lead trial counsel, E.L. Motley, Jr., was diagnosed with depression. Soon thereafter, Motley's depression rendered him incapable of practicing law. In fact, after a series of complaints to the Virginia Bar, Motley was forced to surrender his license. In his habeas petition, Williams contends that his Sixth Amendment right to effective assistance of counsel was violated because Motley was mentally impaired during his trial.

It is well established that the Sixth Amendment right to counsel "cannot be satisfied by mere formal appointment." *Avery v. Alabama*, 308 U.S. 444, 446, 60 S.Ct. 321, 84 L.Ed. 377 (1940). Rather, the Sixth Amendment guarantees criminal defendants the assistance of "a reasonably competent attorney." *McMann v. Richardson*, 397 U.S. 759, 770-71 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). As a consequence, an attorney's mental incapacity may violate his client's Sixth Amendment right to counsel. Here, however, the Danville Circuit Court specifically found, after a two-day evidentiary hearing, that Motley was not acting under a mental or emotional disability during Williams's trial:

Petitioner alleges that he was denied his Sixth Amendment right to counsel because E.L. Motley, Jr.[,] was mentally impaired and unable to effectively represent him in the preparation, trial and appeal of his complex, capital murder case. This court has heard evidence relating to this claim, but finds that Motley was not acting under a mental or emotional disability during the course of his representation of Williams. Specifically Motley did not begin to have problems related to his depression until the late spring or early summer of 1987. Williams' case was tried in 1986. His brief on direct appeal was filed in March, 1987. The opinion of the Supreme Court of Virginia was issued in September, 1987.

It is clear that what problems Motley did have thereafter did not manifest themselves during the trial of this case. Motley prioritized his work by placing the criminal matters ahead of civil matters, and capital murder cases receiving the highest priority. Both Motley and Smitherman prepared the appellate brief, after being counsel in the trial of these cases.

During the two years that he knew Motley, Smitherman never noticed anything about Motley during the course of Williams' trial. Smitherman did not begin to notice a difference in Motley's behavior until 1988. Smitherman noticed no sign of any dysfunction in Motley during the time of their joint representation of Williams.

Based on the testimony at the evidentiary hearing, and on the personal observations of this Court during the course of the criminal trial, this Court finds that E.L. Motley was acting

> under no disability during the course of his representation of the petitioner. Furthermore, to the extent that any claim presented by the petitioner herein is based on the mental problems suffered by Mr. Motley, such claims lack merit.
>
> In fact, at no time during the trial did Motley exhibit any conduct which would lead one to believe he was suffering from any disability.

(J.A. at 1022-24.) The Virginia Supreme Court adopted the Danville Circuit Court's finding and dismissed Williams's Sixth Amendment claim.

The finding that Motley's legal work was not adversely affected by his depression until after the conclusion of Williams's trial and appeal is entitled to a presumption of correctness in this federal habeas corpus proceeding. *See* 28 U.S.C.A. § 2254(e)(1) (West Supp.1998). We cannot say that the Danville Circuit Court's findings, which were adopted by the Virginia Supreme Court, are "an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C.A. § 2254(d)(2) (West Supp.1998). As a result, Williams's claim is without merit and was properly dismissed by the district court.

On July 10, 1986, Dr. Centor was appointed by the trial court to examine Williams after Williams's counsel intimated that he "may lack substantial capacity to understand the proceedings against him or to assist his attorney in his own defense." (J.A. at 1038). Dr. Ryans, although not specifically appointed by the trial court, assisted Dr. Centor in evaluating Williams at the Central State Hospital. On August 13, 1986, Dr. Centor filed a report with the trial court that dealt solely with Williams's competency to plead. During the sentencing

phase, Dr. Ryans and Dr. Centor were called by the Commonwealth as witnesses. Both doctors testified, based solely on Williams's criminal history, that Williams represented a future danger to society.

In his habeas petition Williams contends that his trial counsel mishandled several matters related to Dr. Ryans and Dr. Centor, the court-appointed mental health experts. Specifically, Williams asserts that trial counsel: (1) failed to object to the dual appointment of mental health experts, (2) failed to use the court-appointed experts in violation of *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), (3) failed to bar the Commonwealth's use of the court-appointed experts, and (4) failed to rebut the court-appointed experts' damaging testimony.

1.

First, Williams claims that trial counsel were ineffective because they failed to object to the dual appointment of mental health experts. In response, the Commonwealth argues that the claim is procedurally defaulted because it was never presented to the Virginia state courts, and, in the alternative, is without merit. We agree with the Commonwealth that this claim was procedurally defaulted. As a result, we decline to address the merits.

"In the interest of giving state courts the first opportunity to consider alleged constitutional errors occurring in a defendant's state trial and sentencing," a state prisoner must "exhaust" all available state remedies before he can apply for federal habeas relief. *Matthews v. Evatt*, 105 F.3d 907, 910 (4th Cir.), *cert. denied*, ___ U.S. ___, 118

S.Ct. 102, 139 L.Ed.2d 57(1997); *see also* 28 U.S.C.A. § 2254(b) (West Supp.1998) (barring the granting of habeas corpus relief "unless it appears that the applicant has exhausted the remedies available in the courts of the State"); *Rose v. Lundy*, 455 U.S. 509, 518, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982) ("The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state court proceedings."). To exhaust state remedies, a habeas petitioner must present the substance of his claim to the state's highest court. *See Anderson v. Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982) (per curiam); *Picard v. Connor*, 404 U.S. 270, 275-78, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971); *Matthews*, 105 F.3d at 911. A procedural default occurs when a habeas petitioner fails to exhaust available state remedies and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman v. Thompson*, 501 U.S. 722, 731-32, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

It is undisputed that Williams failed to present the substance of this claim to the Virginia Supreme Court.[6] As a result, Williams failed to satisfy the exhaustion requirement. Moreover, if this claim was presented to the Virginia Supreme Court for the first time at this juncture, it would be procedurally barred pursuant to Va.Code

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[6] Williams does not contend that the facts underlying this claim were either unknown or unavailable to him at the time he filed his amended habeas corpus petition in the Danville Circuit Court.

Ann. § 8.01-654(B)(2) (Michie Supp.1998). Under § 8.01-654(B)(2), "a petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known or available to petitioner at the time of his original petition." *Hoke v. Netherland*, 92 F.3d 1350,1354 n.1 (4th Cir.) (internal quotation marks omitted), *cert. denied*, ___ U.S. ___, 117 S.Ct. 630, 136 L.Ed.2d 548 (1996); *see also* Va.Code Ann. § 8.01-654(B)(2) ("No writ [of habeas corpus] shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition."). Accordingly, we conclude that this claim is procedurally defaulted. *See Gray v. Netherland*, 518 U.S. 152, 116 S.Ct. 2074, 2080-81, 135 L.Ed.2d 457 (1996).

We may excuse Williams's procedural default, however, if he can demonstrate either cause for and resulting prejudice from the default, or that he has suffered a fundamental miscarriage of justice. *See Wainwright v. Sykes*, 433 U.S. 72, 90-91, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (holding that if the petitioner can show cause for the state procedural default, and prejudice resulting there from, the federal courts can address the issue's merits); *Murray v. Carrier*, 477 U.S. 478, 495-96, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) (stating that where a petitioner has suffered a fundamental miscarriage of justice a decision on the merits is appropriate without regard to a procedural default). Because Williams has not established either, his claim is not cognizable in a federal habeas petition. *See Coleman*, 501 U.S. at 750, 111 S.Ct. 2546.

2.

Next, Williams claims that trial counsel were ineffective for failing to use the court-appointed experts in violation of *Ake*. Like Williams's first claim, this claim was never raised in state court and, therefore, is procedurally defaulted. Because Williams cannot demonstrate cause for and resulting prejudice from the default, or that he has suffered a fundamental miscarriage of justice, this claim is not properly before us on federal habeas review. *See Gray*, 518 U.S. at 160-62, 116 S.Ct. at 2080-81.

3.

Next, Williams asserts that trial counsel were ineffective for failing to prevent the Commonwealth from calling his court-appointed experts as witnesses.[7] In particular, Williams contends that his trial counsel should have objected when Dr. Ryans and Dr. Centor testified that he was a future danger to society. As the district court noted, however, Virginia law does not necessarily bar testimony from court-appointed experts. Indeed, the testimony is admissible so long as the expert does not use

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[7] Williams does not contend that his Sixth Amendment right to counsel was violated when the Commonwealth called as witnesses his court-appointed experts. In *Smith v. Moore*, 137 F.3d 808 (4th Cir.), *cert.denied*, ___ U.S. ___, 119 S.Ct. 199 (1998), we were recently asked to determine whether "the Sixth Amendment is violated when the State calls a defense-retained psychiatrist as a rebuttal witness." *Id.* at 819. Because answering that question in the affirmative would have created a new rule of constitutional law, we had no occasion to consider it in a habeas petition. *See id.* at 820-21.

"statements or disclosure" made to him by the defendant as part of the basis for forming his opinion on future dangerousness. *See* Va.Code Ann. § 19.2-264.3. Because the experts' testimony was not based on any statements Williams made but rested solely on Williams's criminal record, any objection would have been futile. As such, trial counsel's performance was simply not deficient. Accordingly, the Virginia Supreme Court's rejection of the claim cannot be deemed an unreasonable application of *Strickland*.[8]

4.

Finally, Williams argues that trial counsel were ineffective for failing to rebut the damaging testimony of his court-appointed experts. In essence, Williams is upset that trial counsel were unable to find an expert who supported his theory of the case. This Court has made clear, however, that a criminal defendant does not have a right to favorable expert testimony. *See Waye v. Murray*, 884 F.2d 765, 766-67 (4th Cir.1989). Thus, that trial counsel were unable to rebut the damaging testimony of his court-appointed experts does not render their assistance ineffective.

---

[8] The Danville Circuit Court also found that Williams's prior criminal activity alone was more than sufficient to support a finding of future dangerousness. We agree. As a result, the testimony of Dr. Ryans and Dr.Centor to the same effect was not prejudicial. Thus, even if trial counsels' performance was deficient, it would not warrant relief under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

V.

Because Williams has failed to provide any grounds upon which habeas relief may be granted, the decision of the district court is affirmed in part and reversed in part.

AFFIRMED IN PART AND REVERSED IN PART.

Supreme Court of The United States

No. 98-8384

Terry Williams,

Petitioner

v.

John Taylor, Warden

ON CONSIDERATION of the motion of petitioner for appointment of counsel,

IT IS ORDERED by this court that the said motion, be, and the same is hereby, granted and it is ordered that Brian A. Powers, Esquire, of Washington, D.C., is appointed to serve as counsel for the petitioner in this case.

May 17, 1999

Supreme Court of The United States

No. 98-8384

Terry Williams,

Petitioner

v.

John Taylor, Warden

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Questions 1a and b, 2, and 3, presented by the petition.

April 5, 1999

Supreme Court, U.S.
FILED
JUN 9
CLERK

No. 98-8384

In The

Supreme Court of the United States

TERRY WILLIAMS,

Petitioner,

v.

JOHN TAYLOR, Warden, Sussex 1 State Prison,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX
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LODGING OF EXHIBITS FROM STATE HABEAS HEARING

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COMMONWEALTH of VIRGINIA

PATRICIA L. WEST
DIRECTOR

DEPARTMENT OF YOUTH AND FAMILY SERVICES
Reception & Diagnostic Center For Children

DONALD W. DRISCOLL
SUPERINTENDENT

1601 BON AIR ROAD
BON AIR VIRGINIA 23235
TEL 323-2600
FAX 323-2312

March 15, 1995

Ms. Linda J. Tarlow
O'Donoghue & O'Donoghue
4748 Wisconsin Avenue, N.W.
Washington, D.C. 20016

Dear Mr. Tarlow:

Enclosed is the entire juvenile file that is on microfilm for Terry Williams here at the Reception and Diagnostic Center. Because of the age of the file, the copies are not very clear.

If we can be of any further assistance, please let me know.

Sincerely,

Beverley Tackett
Secretary Senior

Enc.

PETITIONER'S EXHIBIT 8

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

MOBILE PSYCHIATRIC CLINIC

PSYCHOLOGICAL REPORT
(Group Screening Testing)

Name: Williams, Terry Race: Negro Sex: Male

Birthdate: 9/11/53 Age: 12-3 Education: 6th

Date of Group Testing: 12/26/67

Examining Psychologist: Miller

C.C.H. Caseworker: Moody

As the routine group screening procedure for all minors committed to the Child Care Bureau the following tests were administered: Revised Beta Examination, Wide Range Achievement Test (Reading Sub-test), Bender-Visual Motor Gestalt Test, and House-Tree-Person Drawing Test. This child obtained a Revised Beta I.Q. of 69 and a WRAT reading grade score of 3.3. Together with the available social history this group battery yielded the following impressions for screening purposes:

Although Terry may be intellectually limited, his test results are not entirely consistent with defective intelligence. The possibility of a serious emotional disturbance and/or organicity cannot be ruled out, and retesting is recommended. Although there is no evidence of a visual problem in his folder, it was noticed that when asked to read, Terry held the WRAT only about 3-5 inches from his face. He also complained that he had difficulty reading the numbers on one of the Beta subtests. This problem should be investigated.

BEAUMONT SCHOOL FOR BOYS
Beaumont, Virginia

VOCATIONAL EVALUATION SUMMARY SHEET

Name: Terry (Nigh) Williams Case #: _____ Date: February 17, 1971

INITIAL INTERVIEW:
Terry is a 15½ year old, slender Negro youth from Danville, Virginia. During the interview, he was very quiet and little or nothing was accomplished. He signed a Vocational Rehabilitation Application and was placed in Status 02.

STATED INTEREST:
After a few hours of thinking about vocational training, he managed to come up with these choices: woodwork, plumbing, and custodial work. No interest was expressed in academic school.

SOCIAL INTERACTION:
Terry seems to relate with his peers, however, he continued to be noncommunicable to this authority figure. I don't think it's resentment, it's more unawareness.

INTELLIGENCE:
In my opinion, Terry is functioning in the low dull range of intelligence. He will learn limited vocational training.

STABILITY:
He seems to be withdrawn at the present. However, he knows the ropes.

WORK HABITS:
Terry has very good work habits and tolerance but there were limited abilities displayed. This kid will have to start at the bottom in any type of training.

QUALITY OF WORK:
No outstanding qualities observed.

WORK SAMPLES PERFORMED IN EVALUATION:
(1) Woodwork: he constructed such joints as the Dado, two Cross Laps, very poorly put together.
(2) Custodial: sweeping the floor; he was very slow.

TESTS ADMINISTERED:
(1) Wide Range Achievement Test scoring 4.4 (2-16-71).
(2) Woodwork related course assignment scoring 12 - no effort put forth.

AREAS EVALUATED IN:
(1) Woodwork. Rated Poor.
(2) Plumbing. Rated Poor.
(3) Custodian. Possibility.

RECOMMENDATIONS:
(1) CUSTODIAL SCHOOL (GENERAL WORK),
(2) INSTITUTIONAL WORK.

_____
Director of Vocational Evaluation

[redacted]

JOHN H. STYLE PUBLIC SCHOOL
OF
HANOVER SCHOOL FOR BOYS
HANOVER, VIRGINIA

TRANSCRIPT OF RECORD

This is to certify that Jerry Williams has attended the Academic Department of the Hanover School for Boys, Hanover, Virginia from January 7, 1968 to June 14, 1968. Jerry Williams was enrolled in grade 5th- Community.

ACADEMIC REPORT		TERM REPORT
	Remedial Program Basic II	
Subjects:		
Language Arts		C
Mathematics		C+
Social Studies		C+
History		D
Science		D
Industrial Arts		B
Music		
Health & Physical Education		B-
Days Present	1/7/68 - 6/14/68 = 77 7/1/68 - 8/14/68 = 35	112
Days Absent		

CHARACTER AND PERSONALITY GROWTH

Respect for Authority	C+
Respect for the Rights of Others	C+
Respect for Property	C-
Dependability	C-
Effort	D
Attention [illegible]	C-
Work [illegible]	C+
Making Wise Use of Free Time	F

REMARKS Terry Williams' social behavior has shown improvement, while his academic achievement has somewhat regressed. One day he can carry out any assignment, whereas the following day, he may lapse into daydreaming. This puzzling transition from one extreme to the other was evidenced in his California Reading Achievement Test score of 1.1, administered early in July, 1968. These results indicated that he put forth no effort and, therefore, fell far below his potential.

Socially, Terry has a normal peer and adult relationship for a boy of his age. He is somewhat talkative and active, but creates no special disturbances. Terry responds favorably to correction and seldom reacts in a hostile manner.

Terry is presently enrolled in our summer program. His progress remains the same.

Our plan for Terry is to continue working with him in our Remedial Program. Special Education is definitely recommended for this youth.

RECITATION PERIODS ARE 45 MINUTES IN LENGTH. PASSING GRADE OF THE SCHOOL IS D.

THE MARKING SYSTEM IS AS FOLLOWS:

A- OUTSTANDING
B- ABOVE AVERAGE
C- AVERAGE
D- BELOW AVERAGE
F- UNSATISFACTORY

DATE August 19, 1968

J. J. Stanley
EDUCATION SUPERVISOR

SCHOOL DISTRICT

PRE-HEARING INVESTIGATION

DANVILLE JUVENILE COURT

DALLAS/69

NAME: Terry Williams

ADDRESS: 195 White Street

SEX: Male

BIRTHDATE: September 11, 1955

RACE: Negro

FATHER: Noah Walker Williams

MOTHER: Lula Snipe Williams

ADDRESS: 195 White Street

File #1341

On the morning of February 26, 1957, when Mr. M. T. Bennett of the City Sergeant's Office went to the home of Noah and Lula Williams on Beauregard Street to summon them for Corporation Court, he found that they were not at home, but two of the children were out in the yard playing. It was raining, and the youngest child did not have on shoes. The oldest child, who happened to be about eight years old, told Mr. Bennett that his mother and father had gone to work. Later that same day, Mr. Bennett went back to the house and found both Lula and Noah sitting on the porch. It was evident that they had been drinking and were in such a state that they could not talk plain. Noah told Mr. Bennett that someone had given his children some whiskey to drink, and he was afraid that they were going to die. He said that he had called the doctor two different times, but he would not come because Noah did not have any money. Mr. Bennett went into the front room with Noah, where he found that the youngest children were asleep on the sofa. Mr. Bennett tried to arouse Noah Jr., who is next to the youngest, but he could not awakened. Mr. Bennett also though that the child was dying.

Mr. Bennett came directly to the Health Department and reported the condition of the Williams children to Dr. Ferguson, who in turn sent Nurse Allen to the Williams' home. When Nurse Allen went in, she discovered that in addition to the two children who were asleep on the sofa, there were two more children in the bedroom. These were passed out from drinking some intoxicating beverage. Nurse Allen came back and reported this to the Juvenile Court.

Officer T. C. Talley, Jr. of the Danville Police Department went to the Williams home with Mrs. Kathryn Turner, Probation Officer. Lula and Noah were sitting on the front porch and were in such a drunken state, it was almost impossible for them to get up. They staggered into the house to where the children were asleep. Terry, age 1, and Noah Jr., age 3, were asleep on the sofa. There was an odor of alcohol on the breath of Noah, Jr. It was impossible to awake Noah Jr., at first, but he later woke up for a few minutes. Olander, age 4, was walking around at that time. Oliver had just awakened and was very sick. She said she was hungry and had been drinking whiskey. Ohair was completely passed out and never could be awakened. He did not have on any clothes, but was covered with a sheet.

The home was a complete wreck. There were several men and one woman visiting in the home, but none of them had been drinking. There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash. The only food in the house was a pan of corn-bread, and this looked as if someone had been playing in it and had scattered it all over the floor. The children were all dirty and none of them had on under-pants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them. There was stuffed pickle scattered on the floor in the front bedroom.

Noah and Lula were put in jail, each having five charges of neglect placed against them. The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey. When Dr. Harvey examined them, he found that they had all been drinking bootleg whiskey. They were all hungry and very happy to be given milk, even the baby drank a pint of milk before stopping. Oliver said that they had not had any food all day. Ohair was still so drunk he could not talk.

The next day, Oliver said that her father had sent Ohair out in the back yard to get a bottle of whiskey. He brought it in the house and said Ohair passed the bottle around to the children, while their mother and father watched them. Ohair said that they had drunk whiskey before.

The five Williams children were removed from the hospital on February 27, and on this date, were adjudged neglected and dependent children on Petitions signed by Officer Talley. They were placed in the temporary custody of the Court, until a permanent custody could be determined. They were placed in a Court Boarding Home.

On March 1, 1957, Noah and Lula Williams were tried in the Juvenile Court for neglect of their five children. They were both found to be guilty on each charge and Noah was fined a total of $500.00 and was given a total of two and one half years on the City Farm. Lula was fined a total of $250.00 and given a total of fifteen months in jail. They both appealed these cases and are scheduled for trial in the May Term of the Corporation Court.

On March 30, 1957, Mrs. Kathryn Turner, Probation Officer for the Danville Juvenile and Domestic Relations Court, swore to Petitions on the five Williams children, in which she asked that the children be committed to the Danville Social Service Bureau, as the Court has been unable to work out a satisfactory plan for them. Bessie Lee Surgeon, sister of Noah Williams, is most anxious to have the children stay in her home; however, she only has a two room apartment. She has been keeping the children for Noah and Lula and believes that they will not financially help her and she does not believe that she can completely support them. This is the only plan Noah and Lul can offer for their children; they would like for them to stay in Bessie Lee's home.

DISPOSITION: 4/4/57—On this date, all five of the Williams children were placed in the custody of the Social Service Bureau.

On April 13, 1959, The children were returned to the custody of their parents from the Social Service Bureau.

May 24, 1955, a complaint was received stating that Terry Williams, age 8, had done malicious damage, to wit: broke 25 window glasses and made a mess inside the house by emptying contents of dresser and cabinets in floor and breaking lamps. This was the home of John Hodge of 142 New Street. This complaint was handled unofficially by P. O. who talked with the Williams family. Mr. Williams stated that he was either willing to place the broken window panes or would give Mr. Hodge the money to have it done. Contacted Mr. Hodge's wife and asked that she have her husband phone the Court if he and Noah worked things out agreeably. No further information was received so it was assumed that they had reached an agreement.

9,1966
T A petition was signed by Police Officer Donald L. Goss charging Terry with the
N: larceny of a bicycle, property of Curtis Turner, valued at $40.00. Curtis Turner's name was given on the petition, however, the bicycle belongs to his son, Roger Dale Turner, 1721 Aspen Street.

Several attempts were made to talk with Terry and his parents. Two visits were made to the home but no one was there.

Terry is now living with his parents, Noah and Lula Williams at 195 White Street in Danville, Virginia.

SITION: On November 10, 1966, Terry was placed on probation to the Court.

Terry was not required to report to the office on any regular basis, as it was felt due to his age that it would be best for him not to come across town alone and since both his parents worked a better plan would be for the P. O. to visit the home and keep in close touch with him and the family.

Terry did not seem to understand probation and although he is always a very appealing likable fellow he never actually responds to any conversation or seems to understand right from wrong to any great degree. His parents always try to be cooperative and they say that they try to keep close touch on Terry but he just seems to slip away and go about the neighborhood doing as he pleases.

ENT June 6, 1967, a petition was signed charging Terry with disorderly conduct. On
N: June 16, 1967, he was continued on probation. Also he was charged on the same date with malicious damage to the home of August Farmer in that he threw rocks through the window and hit her children on the head. Terry was continued on probation.

On June 1, 1967, there were two charges of aiding and abetting in the larceny of one bicycle, the property of Ruth Empress, valued at $15.00, the other bicycle being the property of Erma Gray. There were other boys involved in these two larcenies.

On July 11, 1967, Terry was committed to the State Department on these two offenses.

PRESENT PROBLEM: Petitions were signed charging Terry Williams on June 12, 1967, with breaking and entering a store building in the night and the larceny of $75.00 in U. S. coin, the property of Tom Newman. He was further charged with breaking and entering the home of Susan Clark and the larceny of one box of doughnuts, one package of luncheon meat and twenty-five pennies.

PRESENT FAMILY HISTORY: Terry Williams was born in Danville, Virginia, September 11, 1955. He is one of eleven children.

FATHER: Terry is the son of Noah Williams, Sr., who was born in 1910. Noah is a native of Greensboro, North Carolina. His parents are deceased. There are two sisters, Bessie, who lives in Danville, Virginia, on Swanson Street and, Mary, who lives in Greensboro, North Carolina. According to Noah and his wife he has no service record. He attended school through the fifth grade. Noah has no particula religious affiliation. At one time it was generally known in the City that Noah wa a bootlegger, however, there has been no recent complaint of this in the past few years. Noah is now regularly employed by the Danville School Board as custodian a the Westmoreland Grammer School. Noah has always been very cooperative with the Court. He shows a genuine interest in his children but seems limited in his abili to cope with their problems perhaps due to having such a large family. He works hard and although he is known to drink it is thought his drinking is not as excessi as it was in previous years. He shows great concern over his family when they get involved in trouble. Due to his limited education he is not able to secure adequate employment to earn income to meet the needs of the family. However, it h never been known for him to ask for any type of public assistance.

MOTHER: Lula Snipes Williams, age 42 is a native of Caswell County, North Carolin Both of her parents are living. Her father lives in Greensboro and her mother som where in North Carolina. Lula received a fifth grade education. She married Noah Williams, her only marriage, in Danville, Virginia. Noah had been married before. Lula also seems to have a great love and interest in her children but due to her limitations she seems to be ineffectual in discipling them. Her health is not goo she has a tumor and seriously needs an operation, but due to the financial situatio in the home she has not felt she could afford it. She works in service for severa Negro families about three days a week. Lula is a member of the Seventh Day Advan Church on Doe Street where she attends regularly. She takes the children with her when they have something to wear.

SIBLINGS: The Williams have eleven children, ten of which are still in the home, they are n

1. Albert, age 26, resides in Chicago, Illinois.
2. Chair, age 19, attends George Washington High School.
3. Olivia, age 17, attends Langston High School.
4. Olander, age 15, is now at the State Department of Welfare and Institutions.
5. Noah, age 14, attends Langston High School.
6. Terry, age 12, Grammy Grade School.
7. James, age 9, Grammy Grade School.

8. Odessa, age 7, Christy Grade School.

9. Larry, age 6.

10. Laverne, age 4.

11. Jerry, age 3.

HOME AND NEIGHBORHOOD: Terry lives with his mother, father and nine brothers and sisters in a Negro section located in the North end of Danville. They rent their home from Attorney Jerry Williams paying $55.00 per month rent plus having to pay their utility bill. This is a nine-room white frame house with bath and hall. If it was well kept it would be a rather attractive little cottage, but with ten children in the home and limited ability it has always presented a most untidy appearance. The furnithte is dilapidated and inadequate actually to meet the needs. They have a large garden space in the back where each year Lula and Noah have a nice garden which helps to provide food for their children. They have a television which is now broken, a refrigerator and a gas stove. They heat the rooms with coal stoves; this also presents a problem in keeping the house clean. Noah works, as previously stated, at the Westmoreland School where he has a weekly income of $57.00 per week. Lula does service work one or two days a week.

HEALTH: Terry had a fall in 1965 and according to his mother he has not acted right since. He fell on the back of his head and a large place there. She took him to a doctor but she said that the doctor examined his head and said he did not have a concussion, however, she still thinks that it affected his mind and in Lula's words she states, "He needs a head doctor". He has also been in hospital twice; broke his arm once and on the other occassion it was out of joint. Terry has had most of his childhood diseases.

EMPLOYMENT: Terry, due to his age and his size has never had any employment. He helps a little bit around the house and sometimes helps his father and mother in the garden.

RELIGION: This family has no close religious affiliations except the mother, who states that she is a member of the Seventh Day Advintist Church where she attends regularly and takes the children when they have adequate clothes to wear.

SUMMARY: Terry, one of a large family, who has lived under many difficulties. The father has never been able to earn adequate income to meet the family needs. The mother, due to her health, is not regularly employed so is not able to provide very much in a financial way and due to her limited ability, even though she shows love and affection for the children, her discipline is not ineffectual. Terry himself is a very appealing, [illegible] spoken little fellow whose way of expressing himself and explaining his conduct always seems to clear things to himself without his realizing the serious [illegible] of his conduct problems in the environment.

Terry has not stopped [illegible] fit and he continues [illegible] but is talking well [illegible] that he has become quite a problem in school. [illegible] and the principal [illegible] mentally and [illegible]

he might receive some help there, but according to his IQ he would perhaps be unacceptable there, although the father, Noah Williams did sign papers and tried to cooperate with both the school and the P. O. to have him committed.

On October 23rd a petition was signed charging Terry with falsely pulling a fire alarm box on October 15, 1967. A petition was also signed charging Terry with breaking and entering Grasty School in the night-time and larceny from Grasty School on October 15, 1967. A petition was also signed charging Terry with trespassing on the property of Bessie Harper and malicious damage to the property in the amount of $20.00 and larceny of one drop-cord from James Harper; date of offense 10/18/67.

DISPOSITION: November 3, 1967-Committed to St. Dept. on charge of pulling a fire alarm box, Nol Prossed charges of Breaking and entering and trespassing and malicious damage.

Form No. JC-5 (Law of 1950 or Amendments thereto)

RECEIVED
FEB 11 1971
DIAGNOSTIC CENTER

COMMITMENT

Virginia:

In the Juvenile and Domestic Relations Court of City of Danville

WHEREAS, Terry Williams (Name of child committed), a white—colored (check) child or minor 15 years of age, born September 11, 19 55, was on February 11, 19 71 brought before me, Spiro B. Skenderis (Justice's Name), Judge—Associate Judge of the Juvenile and Domestic Relations Court of Danville, Virginia, upon a petition in writing, verified by oath of D. L. Dalton, who is a probation officer—law enforcement officer—a reputable person, alleging that said child or minor comes within the purview of the Juvenile and Domestic Relations Court law of 950, in that the said child or minor Breaking & entering Stonewall Jackso School and commit larceny on 12-10-70 (Describe reasons therefor)

WHEREAS, The provisions of the Juvenile and Domestic Relations Court law of 1950, or amendments thereto, have been duly complied with in assuming jurisdiction of said child or minor:

NOW, THEREFORE, The Court having heard the evidence upon said petition and being of the opinion that the said child or minor comes within the purview of the aforementioned law and that the welfare and best interests of the said child or minor requires that the State should assume guardianship, doth so adjudicate, and doth order that the said child or minor be committed and doth hereby commit said child or minor to the State Board of Public Welfare and Institutions—the State Dept of Welfare & Institutions an agency approved by the State Board of Public Welfare and Institutions and incorporated under the laws of this State for the care, etc., of children—to be received, detained, managed and controlled in the manner prescribed by law.

Given under my hand and seal, this 11th day of February, 19 71

Judge, (SEAL)
Juvenile and Domestic Relations Court — Associate Judge

Form No. JC-8 (Law of 1950 or Amendments thereto)

RECEIVED
FEB 11 1971
DIAGNOSTIC CENTER

COMMITMENT

irginia:

In the Juvenile and Domestic Relations Court of City of Danville

WHEREAS, Terry Williams (Name of child committed), a white—colored (check) child or minor 15 years of age, born Sept 11, 19 55 was on February 11, 19 71 brought before me, Spiros E. Kenderis (Justice's Name), Judge—~~Associate Judge~~ of the Juvenile and Domestic Relations Court of Danville, Virginia, upon a petition in writing, verified by oath of T. C. Talley, who is a probation officer—law enforcement officer—a reputable person, alleging that said child or minor comes within the purview of the Juvenile and Domestic Relations Court law of 1950, in that the said child or minor Breaking and entering Grasty Center and commit larceny on 12-11-70 (Describe reasons therefor)

WHEREAS, The provisions of the Juvenile and Domestic Relations Court law of 1950, or amendments thereto, have been duly complied with in assuming Jurisdiction of said child or minor:

NOW, THEREFORE, The Court having heard the evidence upon said petition and being of the opinion that the said child or minor comes within the purview of the aforementioned law and that the welfare and best interests of the said child or minor requires that the State should assume guardianship, doth so adjudicate, and doth order that the said child or minor be committed and doth hereby commit said child or minor to the State Board of Public Welfare and Institutions—the State Dept of Welfare & Institutionan agency approved by the State Board of Public Welfare and Institutions and Incorporated under the laws of this State for the care, etc., of children—to be received, detained, managed and controlled in the manner prescribed by law.

Given under my hand and seal, this 11th day of February, 19 71

Juvenile and Domestic Relations Court Judge, (SEAL) ~~Associate Judge~~

Form No. JC-6 (Law [illegible]0 or Amendments thereto)

RECEIVED
FEB 22 1971
DIAGNOSTIC CENTER

COMMITMENT

Virginia:

In the Juvenile and Domestic Relations Court of City of Danville

WHEREAS, Terry Williams
(Name of child committed)
a ~~colored~~ (check) child a minor 15 years of age, born September 11, 19 55 was on February 11, 19

brought before me, Stratos B. Svenderis, Judge—~~Associate Judge~~ of the Juvenile and Domestic Relations Court of Danville, Virginia, upon a petition in writing,
(Justice's Name)

verified by oath of W. G. Doss, who is a probation officer—law enforcement officer—a reputable person, alleging that said child or minor comes within the purview of the Juvenile and Domestic Relations Court Law of 1950, in that the said child or minor Breaking and entering Stonewall Jackson School with intent to commit larceny on 12-21-70
(Describe reasons therefor)

WHEREAS, The provisions of the Juvenile and Domestic Relations Court law of 1950, or amendments thereto, have been duly complied with in assuming jurisdiction of said child or minor:

NOW, THEREFORE, The Court having heard the evidence upon said petition and being of the opinion that the said child or minor comes within the purview of the aforementioned law and that the welfare and best interests of the said child or minor requires that the State should assume guardianship, doth so adjudicate, and doth order that the said child or minor be committed and doth hereby commit said child or minor to the State Board of Public Welfare and Institutions—the State Dept of Welfare & Institutions an agency approved by the State Board of Public Welfare and Institutions and incorporated under the laws of this State for the care, etc., of children—to be received, detained, managed and controlled in the manner prescribed by law.

Given under my hand and seal, this 11th day of February, 19 71

Juvenile and Domestic Relations Court, Judge. (SEAL)
Associate Judge

WILLIAMS, Terry

Received February 11, 1971

2-22-71 INTAKE: Assigned to L Cotage; L House------ School A continued to March 19

3-71 PROGRESS REPORTS:
COTTAGE L: Average.
RELIEF: Does what he is told to do, "No trouble at all". Good relations.
L HOUSE: He is most helpful and cooperative. Appears to enjoy his job and gets along well with me and the other boys.
School-A-Math-C: Good. Has some difficulty in getting along with some boys in class. Good respect.
Kibler-Reading Skills-B: Good report. Has ability to do work, tries hard.
Russell-A-Reading: Bright student who could make a lot of progress. Doesn't realize how well he could do if he would really try and pay attention, he requires too much supervision. Fair attitude, it is ashame because he could really progress. Has not decided to do his bet if he does he will pgress rapidly.
RECOMMENDATION: L House - Acad. School----------Continued to April 15.

71 PROGRESS REPORTS:
COTTAGE L: Excellent report.
RELIEF: Very good report. Doesn't talk enough, seems to be a little shy at times, likes to stay by himself.
L HOUSE: Excellent report. He has a marvelous personality. Tries extremely hard to please. Slightly careless with his cleaning at times although quite willing to do work over when told.
SCHOOL-Kibler-Reading Skills-C: Excellent report.
Russell-B-Reading: One of the most improved students that I have - really getting the job done. Effort very good, hasn't been wasting time lately, sticks to his work. Promoted A to B reading, very good progress in work and behavior.
Owen-P,E. Terry is not in my class now. He was transferred. Terry and I had a problem for awhile, but now that is better. He could do what he was told to do. We had a talk and now he understands that he is to do what his supervisors tell him. Very good.
Brett-C: Good Report.
RECOMMENDATION: N House - Acad. School----------Continued to May 20.

20-71 PROGRESS REPORTS:
COTTAGE L: Excellent report.
L COTTAGE HOUSE: He gets along well with me and the other houseboys. Still not the best cleaner but tries hard. Excellent reports.
SCHOOL-Kibler-Skills-B-: Excellent report. Good hard worker, very friendly, often asks if he can have extra work to do. Terry has done a fine job and shown good improvement.
Duke-Math: This boy has been my student for only two weeks and I do not feel I can give him an effective report.
Russell-B-Reading: Excellent report. Continued steady work and progress.
Ellis-P,E.---Very good report. Grade - C
RECOMMENDATION: L House - Acad. Sch.--------Continued to June 17

WILLIAMS, Terry

Cottage L

-71 PROGRESS SUMMARY:
Morehead: Real good, sometimes he is even too good; no trouble, has never lost his temper.
Hall: Real good; no problem; lacks motivation at times.
Crump: Has had no problem with him at lunch.
Duke: Doing fine
Hundley: Nothing derogatory, no trouble at all
RECOMMENDATION: L House - acad. school PLACEMENT

1-13-67 ger — Terry was committed to the State Department of Welfare on this date by the Danville Juvenile Court for Falsely pulling fire alarm.

1-15-67 — Papers received.

1-16-67 — Letter to Judge Moore acknowledging receipt and acceptance of commitment.

1-18-67
2-6-67
2-12-67
Moody
t/Duffell — Terry was seen as an extremely attractive Negro youth who had a very baby face and his stature was so small that he reminded one of a ten year old instead of a thirteen. Worker never saw Terry that he was not smiling as he seemed to enjoy the attention of others. Terry seemed extremely honest in talking about his past behavior and lacked apparent remorse for his actions. In fact, Terry said that his mother had told him to ask for things if he wanted them and if he found that he was not getting them he just decided to take them. He seemed to not have a good understanding of moral judgment and it would seem that possibly he has not been consistently taught the proper guidelines. This youngster was unable to talk about his feelings towards his parents but did not seem to be trying to hold back any feelings about them. He did state that they were not regular drinkers and only drank when his brother from Chicago was home. At that time, he said they dance and argue at the same time. Terry reported that he and his brothers did not get along as they seemed to pick on him a great deal. He stated that he was in the 5th grade and because of watching TV until very late he slept in school a great deal of the time. Terry reported that he finally stopped going to school and that his father knew about this but nothing was done. Terry was not in contact with his family while he was in the study unit. He expressed some concern about his family not keeping in touch with him.

This is the case of a very unsophisticated youngster who has come from a very financially deprived family where there are ten children who are products of parents who have had various drinking problems in the past. Because of the large family and because of the past problems in the home concerning drinking, it is highly probably that Terry has felt an emotional rejection also. As previously mentioned, he soaks up attention and warmth and is able to forget his own feelings. It has been most apparent in talking with Terry that he has a very weak moral judgment probably as a result of not having morals instilled in him. Because of this and because of the various trouble in which he has become involved, it is felt that placement in a foster home at this point would be a risk for this youngster. He is in need of consistent controls and limitations at this point before any other plan could be pursued.

1-27-67 — CLASSIFICATION:

On this date our Classification Committee met and approved the recommendation that Terry be placed in the permanent population of the Illinois Youth Center pending referral and acceptance at the Intensive Treatment Unit.

2-[illegible] — Terry was committed to the Illinois Department of Welfare on this date by the Juvenile Court of Vermilion County, Illinois, upon the charge of [illegible]

[illegible]

[illegible]

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF CORRECTIONS
DIVISION OF YOUTH SERVICES
RICHMOND, VIRGINIA

CERTIFICATE OF DISCHARGE

Whereas, Terry Williams, a boy ~~girl~~ born 9-11-55, was duly committed to the State Board of Corrections on the 13th day of November, 19 67, by the Juvenile Court of Danville, Virginia, under the provisions of Section 16.1-178 (4) of the Code of Virginia as amended, and Whereas, the Board or its authorized agents are of the opinion that the said ward should be released from the guardianship and custody imposed by the above order of commitment because youth has attained age 21

Now, therefore, the Board or its authorized agents hereby Discharge the said ward from its authority this the 15th day of November, 19 76.

STATE BOARD OF CORRECTIONS

BY: _____
Supervisor of Aftercare Services
Division of Youth Services

BY: _____
Assistant Director
Division of Youth Services

RECEIVED
OFFICE O[illegible] OR
JUL[illegible] 1971
[illegible]sion of Youth Services

July 2, 1971

Mrs. Bettye H. Dallas, Chief Probation Officer
Danville Juvenile and Domestic Relations Court
Municipal Building
Danville, Virginia 24541

Re: Terry Williams
B: September 11, 1955
State File: [illegible]
Parents: Mr. and Mrs. Noah W. Williams
195 White Street
Danville, Virginia 24541

Dear Mrs. Dallas:

On June 16, 1971 the treatment team reviewed Terry's progress and have agreed to begin to plan for his release from direct care.

Terry is a returnee to state care. He was first committed by your court on November 13, 1967 for falsely pulling a fire alarm. He was received at Hanover as a permanent boy on January 2, 1968. He was released to your court on August 30, 1971. Terry was recommitted by your court on February 11, 1971 for Breaking and Entering and commit larceny. He arrived at Beaumont on February 11, 1971.

Academic and Vocational:

Terry is attending school one half day and has done satisfactorily, a copy of his transcript is enclosed.

On the vocational level Terry worked as a houseboy. A job which he performed diligently.

Clinical and Casework Evaluation:

Terry was not reevaluated by Mobile Psychiatric Clinic since June 1968.

At that time he received a WISC Full Scale score of 76. Observations of his functioning at Beaumont tends to reinforce the validity of the score.

While at Beaumont he has at times been withdrawn from the peer group of his cottage. Terry has a problem in relating socially with people. He craves attention but does not extend himself toward others for fear of rejection. It is significant that he related well with his housemother.

Unless Terry is able to establish a strong positive relation with a significant adult in his life he will probably continue to regress to anti-social behavior. In the controlled atmosphere of Beaumont Terry has functioned well.

Health:

Our school physician has examined Terry and found him to be in good health.

Religion:

Church services held regularly at Beaumont were attended by Terry and we hope he will be encouraged to attend the church of his choice.

Plan:

It is our plan that Terry return to his home. School is also recommended for this lad but we are not optimistic that he will. It is hoped that the Vocational Rehabilitation Counselor in your city will help him.

We will wait to hear the results of your home investigation.

Sincerely,

John T. Kielty, Jr.
Casework Supervisor

JTK/ss
CC: Mr. C. R. Minor
V.D.V.R.

enc.

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF WELFARE AND INSTITUTIONS

DIVISION OF YOUTH SERVICES

RICHMOND, VIRGINIA

C E R T I F I C A T E O F D I S C H A R G E

Whereas, Terry Williams, a boy-~~girl~~ born 9-11-55,
was duly committed to the State Board of Welfare and Institutions on the 13th
day of November, 19 67, by the Juvenile & Domestic Relations
Court of Danville, Virginia, under the provisions of
Section 16.1-178(4) of the Code of Virginia as amended, and
Whereas, the Board or its authorized agents are of the opinion that
Terry Williams should be released from the
guardianship and custody imposed by the above order of commitment because
"He has made a satisfactory adjustment in his community."

Now, therefore, the Board or its authorized agents hereby discharge the said
Terry Williams from its authority this the
24th day of March, 19 68.

STATE BOARD OF WELFARE AND INSTITUTIONS

BY: _____

_____

BY: _____

_____

August 23, 1968

Mrs. Bettye H. Dallas, Chief Probation Officer
Juvenile and Domestic Relations Court
Municipal Building
Danville, Virginia 24541

Re: Terry Williams
Born: 9-11-55
Our File: #16135

Dear Mrs. Dallas:

This is a summary, including the plan of our Placement Committee for the release of the above-named youth at the earliest practicable time. We would appreciate your investigation of the home and family situation in order to determine the feasibility of his return to the community under your supervision.

Terry was committed to the State Department of Welfare and Institutions on 11-13-67 by the Danville Juvenile Court for falsely pulling a fire alarm.

Enclosed you will find a copy of our psychological report.

Terry's problem seems to be centered around his home situation. He is the product of emotional and financial deprivation. He is starved for the attention he could not receive in his large family. His parents seemed to care very little for their children, and Terry received very little moral training at home.

Terry seems to be able to function very well in our environment of routine controls. We attempted to punish Terry for his wrongdoings but to show him that discipline does not mean a loss of love. Terry has responded very well. He knows what good behavior is, and if given a reason can almost behave perfectly. For example, during June we set aside a week for good manners. We had a contest to see who could be the best behaved for the week. Terry was absolutely perfect for the week. When he received the prize, he seemed to lose his motivation for being good. Terry must be continuously motivated and guided, and when he sees that you care or he able to function very well. We feel that with the proper supervision and guidance he will be able to make a good adjustment on the community level.

Terry has received the routine injections and is enjoying good health. He will be given a complete physical prior to his release.

Terry was enrolled in our academic department, and his transcript is enclosed. Reports show that he is not motivated at all times; therefore, his work is not consistent.

We feel that Terry has received the maximum from our program, and we propose to release him to the Juvenile Court of Danville. Terry would like to return to his parents, Mr. and Mrs. Noah Williams of 195 White Street, Danville, Virginia. We feel that unless there is some change in the home that this is probably not a favorable placement. If this placement proves not feasible, the possibility of placement with a relative, possibly Mrs. Bessie Surgion, Terry's aunt, may be considered. If these placement plans fail, we suggest foster placement. This plan is subject to the approval and under the supervision of the Juvenile Court of Danville.

Very truly yours,

Samuel A. Mills
Child Welfare Worker

E. JORDAN, JR.
Superintendent

George Dorman, Jr.
Child Welfare Supervisor

cc: Mr. C. R. Minor
Enclosures
SAM/eig

January 18, 1968

Mrs. Bettye H. Dallas, Chief Probation Officer
Danville Juvenile and Domestic Relations Court
Municipal Building
Danville, Virginia 24541

Re: Terry Williams, N-M
Born: 9-11-55 (verified)
Our File #16135

Dear Mrs. Dallas:

This is a progress letter on the above-named youth who was committ to this Department on 11-13-67 by the Danville Juvenile Court for fal pulling a fire alarm. Terry was known previously to the court. He was placed in the study unit at the Hanover School for Boys 11-20-67.

CLINICAL AND CASEWORK EVALUATION:

See the enclosed psychological report.

Terry was seen as an extremely personable youngster who readily r nded to attention given him by others. Terry's appearance and unsophi tion reminded one of a much younger child. Although Terry was quite ho in admitting his participation in the offenses, he seemed to lack unde ending of the wrongness of his actions. Terry was unable to discuss his r tionsh with his parents but never displayed any negative feelings toward t . He saw himself as a target of great teasing from his other brothers an ng obtained the feeling that he felt somewhat "lost in the shuffle" am go am siblings. In general, this seems to be a youngster with a low intel ent quotient who has apparently suffered from this as well as from emoti l and financial deprivation. As a result, he is presently displaying sig f irresponsible behavior and apparently has received little moral tra s fro home.

HEALTH:

After receiving a physical examination, Terry was found to have a umbilical hernia and to be physically immature for his development.

Recommendations were for general upbuilding, polio vaccinations and a TI test.

ACADEMIC:

According to Terry, he was last in the 5th grade where his interest was ... He claimed to have slept in school quite often as a result of having wat... television late the night before. Terry reported that finally he stopped going to school altogether.

STUDY UNIT ADJUSTMENT:

Terry was noted to be a very vivacious youngster in the study unit but one who was able to get along with his peers and able to accept authority.

RELIGION:

Terry and his family have been irregular attenders of church. While he was in the study unit he did attend the weekly non-denominational religious services.

PLAN:

On 12-28-67, our Classification Committee met and approved the recommendation that Terry be placed in the permanent population of the Hanover School for Boys pending referral and acceptance at the Petersburg Training School. It was felt that this youngster was in need of consistent controls and could profit from such help that he could receive at the training school.

We hope this information has been helpful to you, and if we can be of further assistance please do not hesitate to contact us.

Sincerely,

(Miss) Nancy Y. Moody
Child Welfare Worker

NYM:md
Enclosure:
cc: Hanover

(Miss) Betty Weikel, ACSW
Child Welfare Supervisor

ROBIN A. LaDUE, Ph.D.
Clinical Psychologist
1600 Benson Rd S Suite 201 • Renton, Washington 98055 • (206) 277-5616

April 17, 1995

Ms. Linda Tarlow
O'Donoghue & O'Donoghue
4748 Wisconsin Ave. NW
Washington, DC 20016

Dear Ms. Tarlow,

I am writing in response to your request for an affidavit on the effects of prenatal alcohol exposure on brain functioning. Your specific request concerned people with FAS having the ability to distinguish fact from fiction. As I have indicated to you, people diagnosed with Fetal Alcohol Syndrome and Fetal Alcohol Effect have frontal lobe damage which impairs judgment and abstracting abilities. It is not uncommon for people with FAS to have difficulties with memory and to have difficulty telling fact from fiction.

However, these deficits vary from person to person. Unless a diagnostic examination and a psychological evaluation are conducted, it is not possible to assume any one individual will display such deficits.

If you have any questions, please feel free to contact me. I would also refer you to the following references:

LaDue, R.A. Psychosocial Needs Associated with Fetal Alcohol Syndrome. Fetal Alcohol and Drug Unit, University of Washington Medical School, 1993.

Streissguth, A.P., LaDue, R.A. & Randels, S.P.: "A Manual on Indian Adolescents and Adults with Fetal Alcohol Syndrome". University of Washington, Seattle, WA, 1986, Indian Health Service, Rockville, MD, 1987.

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Streissguth, A.P., Aase, J.M., Clarren, S.K., Randels, S.P., LaDue, R.A. & Smith, D.F.: "Fetal Alcohol Syndrome: Natural History in Adolescents and Adults". Journal of the American Medical Association, 265(15), 1991, pp 1961-1967.

Sincerely.

Robin A. LaDue, PhD
Clinical Psychologist

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

VIRGINIA STATE BAR,

v. VSB NO. 87-050-0381

EVERETT L. MOTLEY JR.

ORDER

This matter came on for a hearing before the Board on the 19th day of May, 1989. Members of the panel were: Phillip C. Stone, Chairman; Billy Joe Tisinger; Peter C. Manson, Jr.; Janice J. Brice and Bernard J. DiMuro. Angela Edwards Roberts, Assistant Bar Counsel, was present for the Bar. The Respondent did not appear either in person or by counsel.

The Respondent did not appear at the appointed hour of 9:00 a.m. The panel began the hearing at 10:30 a.m. At the direction of the Chairman, the bailiff checked the hallways and called out the name of the Respondent three times. There was no response.

The Bar introduced exhibits indicating appropriate and timely notice to the Respondent of these proceedings. In addition, the Chairman noted that a letter dated May 12 and received by the Bar office on May 16, 1989 from the Respondent indicated his knowledge of the scheduled hearing. The Chairman noted that when he had been informed by Bar Counsel of the receipt of the May 12 letter in which the Respondent indicated his desire for a

PETITIONER'S EXHIBIT

continuance, the Chairman directed that the letter be sent to him by facsimile for consideration. The Chairman treated the letter as a motion for a continuance and denied the motion. The Order denying the motion was entered on May 17, 1989.

Bar Counsel confirmed that no further communications were received by her from the Respondent.

The Bar then presented its evidence.

Upon the evidence, the Board finds that there was clear and convincing evidence to establish the following:

1. By Order of the Danville Circuit Court entered September 28, 1982, the Respondent was appointed as a Substitute Trustee to administer certain trust funds for the benefit of Marion Smith Walton and Louise Walton Cobb. As a result of such appointment, the Respondent thereafter was entrusted with certain funds of the trust which, as an attorney and trustee, he was obligated to hold, disburse and render accountings in a fiduciary capacity.

2. The Respondent failed thereafter to attend promptly to the matters undertaken by him in this matter in that he failed to properly monitor the funds in his possession and properly handle the bank accounts in which those funds were deposited. As a result of the neglect and failure to attend promptly to such matters, on a number of occasions and, in fact, during almost all months that the Respondent handled these funds, the specific trust account in which the funds were deposited was overdrawn. The Respondent issued or caused to be issued checks payable on

that trust account which were returned because of insufficient funds in the account, or service charges for those checks were charged to the account for the overdraft. In addition, the Respondent failed to file any accounting in regard to his fiduciary responsibilities in this matter.

3. In the handling of this matter, the Respondent failed to maintain any trust account records in that he had no ledger cards, no cash receipts journal, no cash disbursement journal, nor any other records required to be kept and maintained on a trust account, all of which resulted in the lack of any accounting for the funds entrusted to the Respondent and overdrafts in the trust accounts as described above. Since no records were maintained, no periodic trial balances were made, no reconciliations were done, insufficient-fund check reporting did not occur and deposit records were not maintained.

4. There is nothing to indicate that the trust property was ever at risk, mingled with any funds of the Respondent or other clients or in any way abused by the Respondent. In fact, the Respondent took no commissions or fees from the trust property. The bank service charges assessed against the trust account for overdrafts (which overdrafts resulted from the negligent failure of the Respondent to transfer trust funds from an interest-bearing savings account into a checking account) were paid by the Respondent. The Complainant neither suffered any actual loss from the conduct of the Respondent nor were her trust funds ever subjected to any jeopardy by the Respondent.

The Board found by clear and convincing evidence that the Respondent violated DR 6-101(B); DR9-102(B)(3); DR9-103(A)(1), (2) and (3); and DR9-103(B)(4), (5) and (6). The Board found there was not clear and convincing evidence as to the violation of DR9-103(B)(1) and (2).

The Board then inquired as to whether there was any record of any prior violations of Disciplinary Rules by the Respondent. It was disclosed that a private reprimand was issued against the Respondent by the Sixth District Committee on November 19, 1986 (Bar Exhibit 27), which private reprimand involved claims of failure to maintain trust account records properly at approximately the same time as this matter.

Upon consideration of the evidence and the prior violation of the Respondent, it is ORDERED that the license of the Respondent to practice law in the Commonwealth of Virginia be suspended for a period of one hundred and twenty (120) days commencing on the 19th day of June, 1989 and continuing until the 17th day of October, 1989.

It is further ORDERED that the Respondent immediately give notice, by Certified Mail, of the suspension of his license to practice law in Virginia to all clients for whom he is currently handling matters and to all opposing attorneys and to the presiding judges in pending litigation, and he shall further make immediate appropriate arrangements for the disposition of those matters presently in his care in conformity with the wishes of

his clients, all pursuant to the Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13(J)(1).

It is further ORDERED that the Respondent shall furnish evidence of his compliance hereto to the Virginia State Bar within thirty (30) days from the date of this Order.

It is further ORDERED that a copy of this Order shall be mailed to Everett L. Motley, Jr. at his last address on file with the Virginia State Bar, P. O. Box 3702, Danville, Virginia 24543.

ENTERED THIS 31st DAY OF MAY, 1989

VIRGINIA STATE BAR DISCIPLINARY BOARD

By:

Phillip C. Stone, Chairman

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

VIRGINIA STATE BAR

v. VSB NO. 88-050-0344

EVERETT L. MOTLEY JR.

ORDER

This matter came on for a hearing before the Board on the 19th day of May, 1989. Members of the panel were: Phillip C. Stone, Chairman; Billy Joe Tisinger; Peter C. Manson, Jr.; Janice J. Brice and Bernard J. DiMuro. Angela Edwards Roberts, Assistant Bar Counsel, was present for the Bar. The Respondent did not appear either in person or by counsel.

The Respondent did not appear at the appointed hour. The panel delayed commencement of the hearing from its noticed time of 9:00 a.m. until 9:45 a.m. At the direction of the Chairman, the bailiff checked the hallways and called out the name of the Respondent three times. There was no response.

The Bar introduced exhibits indicating appropriate and timely notice to the Respondent of these proceedings. In addition, the Chairman noted that a letter dated May 12 and received by the Bar office on May 16, 1989 from the Respondent indicated his knowledge of the scheduled hearing. The Chairman noted that when he had been informed by Bar Counsel of the receipt of the May 12 letter in which the Respondent indicated his desire for a continuance, the Chairman directed that the letter be sent to him

PETITIONER'S EXHIBIT 20

by facsimile for consideration. The Chairman treated the letter as a motion for a continuance and denied the motion. The Order denying the motion was entered on May 17, 1989.

Bar Counsel confirmed that no further communications were received by her from the Respondent.

The Bar then presented its evidence in the form of exhibits and the testimony of the complainant and a Bar investigator.

Upon the evidence, the Board found that there was clear and convincing evidence to establish the following:

1. The Respondent was retained in June, 1985 to represent the complainant in a divorce and property matter. The complainant was seeking a divorce a vinculo matrimonii, which could have been obtained within one year of the date he was retained. A final decree was entered on June 22, 1987.

2. At the time the complainant retained Respondent, the complainant and her husband had agreed that the husband would convey his interest in their marital abode to the complainant in settlement of their joint property rights. The Respondent was to prepare a deed making the conveyance. The Respondent did not provide the deed to the complaint until the day before the hearing before the Fifth District Committee in this case, at which time the husband had begun to reconsider his agreement to convey the property. The husband still has not signed the deed.

3. The complainant made numerous attempts to contact the Respondent by telephone and once by letter, but the

Respondent failed to return the telephone calls or answer the letter.

The Board found by clear and convincing evidence that the Respondent violated DR6-101(B) and DR6-101(C).

Because the Respondent was the subject of a hearing on a different charge immediately following this case, the Board deferred requesting information about any prior violations on the part of the Respondent and also deferred its decision as to the sanction.

After the completion of the hearing of the other case, the Board inquired as to any prior violations on the part of the Respondent and learned that a private reprimand was issued against the Respondent by the Sixth District Committee on November 19, 1986.

Upon consideration of the evidence, it is ORDERED that the Respondent be and he is hereby issued a PUBLIC REPRIMAND.

It is further ORDERED that a copy of this Order shall be mailed to Everett L. Motley, Jr. at his last address on file with the Virginia State Bar, P. O. Box 3702, Danville, Virginia 24543.

ENTERED THIS 31st DAY OF MAY, 1989

VIRGINIA STATE BAR DISCIPLINARY BOARD

By: _____
Phillip C. Stone, Chairman

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
EVERETT L. MOTLEY, JR.

CASE # [illegible]

ORDER

It appearing that Assistant Bar Counsel has determined that probable cause exists to believe that Everett L. Motley, Jr. suffers from a disability which renders him incompetent to practice law; and

It further appearing that Assistant Bar Counsel has requested this Board to conduct a hearing in this matter pursuant to the Rules of Court, Part Six: Section IV: Paragraph 13(E),

It is ORDERED that this matter be, and it is hereby, set for hearing in the Green Courtroom, of the Fourth Circuit Court of Appeals, 10th & Main Streets, Richmond, Virginia. The hearing shall commence at 9:00 a.m. on Friday, September 22, 1989.

It is further ORDERED that Whittington W. Clement, a discreet and competent attorney-at-law be, and he is hereby, appointed guardian ad litem on behalf of Everett L. Motley, Jr. and to represent Mr. Motley's interests as the guardian ad litem shall deem best.

ENTER THIS ORDER THIS 14th DAY OF September, 1989.

VIRGINIA STATE BAR DISCIPLINARY BOARD

By: [signature]

PETITIONER'S EXHIBIT 21

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
EVERETT L. MOTLEY, JR.

CASE NO. 90-000-0185

ORDER

On Friday, September 22, 1989, came on for hearing the Petition of the Virginia State Bar to suspend the license of Everett L. Motley, Jr. pursuant to the Rules of Court, Part Six: Section IV: Paragraph 13(E). The hearing was held before a duly convened panel of the Virginia State Bar Disciplinary Board consisting of Phillip C. Stone, Janice J. Brice, William J. Sturgill, Bernard J. DiMuro and Alex T. Mayo Jr. Angela Edwards Roberts appeared on behalf of the Virginia State Bar.

Whittington W. Clement, guardian ad litem for Everett L. Motley submitted an affidavit dated September 21, 1989, from Dr. B. R. Ashby, Motley's psychiatrist, which updated his medical condition. From the affidavit and the previous medical report submitted to the Disciplinary Board dated June 21, 1989, it is clear that Mr. Motley currently suffers from a disability which prevents him from engaging in the practice of law. Dr. Ashby notes in the affidavit that "It is my opinion that his psychiatric impairment is so severe that he is totally unable to carry out his private practice of law."

Wherefore, it is the judgment of the Board that the license of Everett L. Motley, Jr. to practice law in the Commonwealth of Virginia should be suspended for such a period of time as he may suffer from a disability, and it is so ORDERED.

PETITIONER'S EXHIBIT 22

It is further ORDERED that an attested copy of this Order be mailed to Everett Lyle Motley, Jr., at P. O. Box 3702, Danville, Virginia 24543.

ENTER THIS ORDER THIS 22nd DAY OF SEPTEMBER, 1989

VIRGINIA STATE BAR DISCIPLINARY BOARD

Chairman

IN THE CIRCUIT COURT OF DANVILLE
COMMONWEALTH OF VIRGINIA

TERRY WILLIAMS, Petitioner, v. CHARLES THOMPSON, Mecklenburg Correctional Center, Defendant.	LP 88-81 HABEAS CORPUS

AFFIDAVIT OF BARBARA S. CRUMPTON

I, Barbara S. Crumpton, do hereby depose and state as follows:

1. In 1984, the court appointed E.L. Motley, Jr. as guardian ad litem for my mother, Carrie W. Scearce. A court-appointed attorney was necessary because my mother was unable to handle her own affairs and there was a disagreement between family members regarding her finances.

2. I have been contacted by the law firm of O'Donoghue & O'Donoghue to give this affidavit in support of a Petition for a Writ of Habeas Corpus to be filed on behalf of Terry Williams, an inmate on Virginia's death row. I understand that Mr. Williams was also represented by E.L. Motley, Jr.

3. My mother received a total of approximately $450.00 per month in social security and retirement benefits. During the time that E.L. Motley was her guardian, he continually failed to properly handle her accounts.

4. On at least three to five occasions, Mr. Motley wrote bad checks to me from my mother's account. Mr. Motley simply did not

PETITIONER'S EXHIBIT 24

deposit her checks in a timely manner. He permanently lost five of her pension checks.

5. Mr. Motley had no secretary to assist him and seemed to be behind in his work. He would promise to attend to depositing checks and balancing accounts. However, he was never able to perform his duties in an acceptable manner. He also failed to return my phone calls. He was always nice to me when I complained, but he continued to do a bad job.

6. Finally in 1986, I complained to the Virginia Bar about Mr. Motley. I attended a hearing in Danville and, at that hearing, Mr. Motley still could not produce pension checks he had received for my mother. After the hearing, I began to handle my mother's financial affairs. In November of 1986, I received a decision that Mr. Motley was reprimanded for his handling of my mother's case.

7. In my opinion, Mr. Motley was disorganized, overwhelmed, and incompetent during the period from 1984 to 1986 that he represented by mother.

8. I have been assisted in understanding this affidavit by Linda J. Tarlow, who has reviewed its contents with me by telephone. I understand all of the information that it contains.

I declare under the penalty of perjury that the foregoing is true and correct.

Barbara S. Crumpton

ljt\tw\crumpton.aff

IN THE CIRCUIT COURT OF DANVILLE
COMMONWEALTH OF VIRGINIA

TERRY WILLIAMS, Petitioner, v. CHARLES THOMPSON, Mecklenburg Correctional Center, Respondent.	)

AFFIDAVIT OF BRUCE ELLIOTT

COMMONWEALTH OF VIRGINIA)
)
COUNTY OF ~~Rockingham~~) ss
CITY OF Harrisonburg)

I, Bruce Elliott, after being duly sworn on oath do depose and say as follows:

1. I make this statement from my own personal knowledge.

2. I currently reside at 1570 North College Avenue, Harrisonburg, Virginia 22801.

3. I am a certified public accountant and a partner in the accounting firm of Elliott and Troyer in Harrisonburg, Virginia.

4. I met Terry Williams on February 19, 1978 while he was incarcerated at Virginia Correctional Union #8 in Harrisonburg, Virginia. My first contact with Terry was through an informal prison ministry program at Trinity Presbyterian Church in Harrisonburg.

5. Terry remained at the Harrisonburg facility until October or November 1978. While Terry was at Unit #8, I visited him every two to three weeks.

6. In October or November 1978, Terry was transferred to Unit #28 in Martinsville, Virginia. I visited Terry eight to ten times while he was at Unit #28. I attended Terry's graduation from the Carpentry school at the Martinsville facility. Terry took pride in his achievement at the Carpentry school. While at Martinsville, and any other facility, Terry always sought to prove to the correctional officers that he was a worthwhile person. Terry always took pride in the work that he performed while in custody and was very pleased that his efforts were recognized when he was placed on the "A Custody List" at Martinsville.

7. When Terry was on parole from 1980-1982, I saw him five or six times. We talked on the phone every few weeks. On one occasion, Terry came and stayed at my home in Harrisonburg. On another occasion, Terry and I went to a football game in North Carolina. When I was with Terry, he never expressed words of harshness for anyone. Terry was never angry nor bitter and I do not believe that Terry is a violent person. Terry is a mild mannered person and is not aggressive. I have never felt the least bit of fear when I was around Terry.

8. When Terry was subsequently incarcerated for breaking and entering, I visited him both at the Danville County Jail and at every other facility to which he was transferred.

While Terry may have been frustrated with his situation, he never expressed hostility toward anyone. As was the case in Martinsville, Terry was always concerned about making a good impression to those in charge of the correctional facilities and was proud of the work he performed while incarcerated. In my opinion, Terry always seemed to thrive in a more regimented and structured environment. Generally, I believe that when Terry was living in Danville, he was constantly being taken advantage of due to his small size, intelligence, and gullibility. Terry always emphasized that there was "nothing for him" in Danville.

9. In 1984, I wrote a letter in support of Terry's application for parole. In this letter, I emphasized that Terry had no future in Danville and suggested that he should be put in a half way house somewhere else in the state.

10. I frequently talked to Terry on the phone in 1985 after he was released. Often, during this period, Terry was living on the street. I was completely surprised when Terry phoned me about the capital murder charge. I could never imagine Terry intentionally harming anyone.

11. On my own initiative, I contacted one of the attorneys representing Terry in his capital murder trial. I believe that the attorney I spoke to was Mr. E.L. Motley. I spoke to the attorney about my relationship with Terry and that I had known Terry for several years. I offered to do anything I could to help Terry's situation. The attorney I talked with thanked me but never called back.

12. I have known Terry Williams for over ten years. During those ten years, Terry has been through frustrating and difficult times. But through it all, Terry tried to make the best out of a terrible family and financial situation. He has always endeavored to show persons in authority that he is a worthwhile human being. Terry has never sought revenge nor blamed others for his problems. Without hesitation, I can say that I have never seen Terry express a violent emotion and he is not a violent person.

Bruce Elliot
Bruce Elliott

Subscribed and sworn to
before me this 28th day
of July, 1988.

Kathleen M. M. Todd
Notary Public

My Commission Expires:
11/11/91

IN THE CIRCUIT COURT OF DANVILLE
COMMONWEALTH OF VIRGINIA

TERRY WILLIAMS,

Petitioner,

v.

J.D NETHERLAND,
Mecklenburg Correctional Center,

Defendant.

LP 88-81 HABEAS CORPUS

AFFIDAVIT OF JIMMIE L. JOYCE

I, Jimmie L. Joyce, having been duly sworn, do hereby state as follows:

1. I will not be in the State of Virginia on June 15 and 16, 1995 because of vacation plans. I will be unable to appear at an evidentiary hearing in Danville on either of those days without changing my plans and causing considerable disappointment to myself and my family.

2. I have reviewed the original statement I gave to the lawyers in Terry Williams' case on August 3, 1988. I agree with everything in my statement and would testify to its contents in Danville had I not made previous plans.

Jimmie L. Joyce

Sworn and subscribed to
before me this 1 day
of June, 1995.

Betty M Edwards
Notary Public

My commission expires: 1/31/96

ljt\tw\joyce.aff

PETITIONER'S EXHIBIT 27

IN THE CIRCUIT COURT OF DANVILLE
COMMONWEALTH OF VIRGINIA

TERRY WILLIAMS,	)
Petitioner,	)
v.	)
CHARLES THOMPSON, Mecklenburg Correctional Center,	)
Respondent.	)

AFFIDAVIT OF JAMES JOYCE

COMMONWEALTH OF VIRGINIA)
) ss
HENRY COUNTY)

I, Jimmie ~~James~~ Joyce, do depose and state as follows:

1. I am presently the Assistant Superintendent of Patrick Henry Correctional Unit in Spencer, Virginia.

2. I met Terry Williams when he was a prisoner at the Chatham Correctional Unit in the early 1980's. I was employed there as a facility manager.

3. I remember Terry as a quiet, courteous, neat, cooperative and non-violent prisoner during his time at Chatham. In fact, his good behavior prompted the kitchen officer to select him to work in the guards' dining room. Such work was assigned only to prisoners who were regarded as trustworthy, and who did not pose a danger.

4. I was a correctional officer at the Patrick Henry unit back in the mid-1970's. Terry was a prisoner there at the same time, but I did not get to know him until he went to the

Chatham unit some years later.

5. Terry's counsel has informed me that Terry was an "A custody" prisoner at Patrick Henry. "A custody" indicates that the prisoner is regarded as "minimum security." It is common for a prisoner who has entered the prison as "B custody," or medium security, to be upgraded to "A custody" as a result of good behavior. Whether a prisoner deserves "A custody" status is decided by prison counselors, who use a scoring system to make their determination. The counselors' decisions are subject to approval by the Richmond Central Classifications Office. Among the factors which counselors consider are history of institutional violence, severity of current offense, escape history, and disciplinary record. If Terry was deemed to be "A custody," this meant that he was among those prisoners considered least likely to act in a violent, dangerous or provocative way.

6. Terry's counsel has informed me that Terry was on "work release" during the final months of his stay at Patrick Henry. The work release program allows select inmates to work in the community for wages higher than those they could obtain while working on a road gang. To be eligible for work release, Terry had to have been in "A custody," nearing parole and without disciplinary infractions for six months before entry into the program. And to actually be selected for work release, he had to have had a good prison work record and highly favorable staff evaluations. In those days, the correctional institution selected inmates for work release subject to approval from the

Richmond Central Classifications Office.

7. Terry's counsel has informed that he attended woodwork school while a prisoner at Patrick Henry. The requirements for the woodwork school were about the same as those for the work release program. The school was reserved for well-behaved, minimum security prisoners who were close to parole.

I have read the foregoing and they are true and correct to the best of my knowledge and recollection.

~~James~~ Joyce
Jimmie L.

Subscribed and sworn to
before me this 3 day
of ~~July~~, August 1988.

Jerry M. Brown
Notary Public

My commission expires:

11- 18- , 1988.

AFFIDAVIT OF JENNIE WILLIAMS

CITY OF DANVILLE
~~STATE OF NORTH CAROLINA~~)
COMMONWEALTH OF VIRGINIA) ss
~~COUNTY OF CASWELL~~)

I, Jennie Williams, depose and state as follows:

1. I have been asked by Terry Williams' lawyers to give this affidavit for their use in his habeas corpus appeal. I give this statement willingly and freely.

2. Terry Williams is my father.

3. I currently live with my mother in Milton, North Carolina. I am 13 years old and attend junior high school.

4. Although my mother and father have been separated for a long time, I have seen my father throughout the years when visiting with his family or my mother's family. I love my father and wish he was out of prison so that he could visit me. My father has been good to me and would give me money if I asked him or buy me a gift. He has never hit me or physically hurt me. I know sometimes he gets in trouble but he has never tried to get me involved in anything bad or dangerous.

5. I went to his trial in September 1986. I would have testified on his behalf and told the jury that my father has tried to be a good daddy to me, but, I was not asked to testify. I met my father's attorney for the first time at the trial. He didn't ask me any questions about my daddy.

6. From time to time my father calls me or writes to me from prison. He tells me that he loves me and misses me.

PETITIONER'S EXHIBIT 28

I have read the foregoing statements and/or they have been read to me, and they are true and correct to the best of my knowledge and recollection.

JENNIE WILLIAMS

Subscribed and sworn to
before me this 9th day
of April, 1988.

Frann J. Martorana
NOTARY PUBLIC

My Commission Expires:
March 27, 1992.

AFFIDAVIT OF JENNY LEE WILLIAMS

STATE OF NORTH CAROLINA)
) ss
COUNTY OF CASWELL)

I, Jenny Lee Williams, depose and state as follows,

1. I have been asked to give this affidavit by Terry Williams' attorney for use in his habeas corpus petition and I give this affidavit willingly and freely.

2. I currently live in Milton, North Carolina.

3. Terry and I were married in 1973 and we lived for approximately the first three years of our marriage in Java, Va. Those were relatively happy times. Terry worked tobacco and he worked very hard. I also worked tobacco for a while and also kept house in our log cabin. In 1975 we had a little girl whom we named Jennie. Terry loves her very dearly; she is the pride of his life.

4. While in Java, Terry spent a lot of time with my family. He would fish or play basketball or softball with my brothers and watch television with my father. He was also very close to my mother who considered him like a son. One bad incident I recall was the time my father hit Terry over the head very hard with a chair. Terry had not provoked the attack. He required several stitches at the hospital.

5. In 1976 Terry and I separated, however, even after that we were still fairly close and to this day we are still married. While separated, Jennie and I would visit Terry and his family often. Terry would love to see his daughter and he would spoil her with gifts or money.

6. I can not believe Terry would intentionally injure or kill someone. I have never seen Terry act violently toward anyone.

7. At the time of his capital murder trial in September 1986, Terry wrote to me and asked me to come to his trial and help if we could. I wasn't happy about exposing my daughter to the bad things people were apparently going to say about Terry but I thought it was very important for me and my daughter to go to the trial and help Terry in any way we could. At the trial I met Terry's lawyer, Mr. Motley, for the first time. I think Terry pointed us out and he came over and introduced himself to us. I asked him how the trial was going and he said something like "ok". That was the extent of our conversation. He never asked me or Jennie any questions about Terry. He never asked me or Jennie to testify. We both were willing to testify if he had asked us to do so.

8. Since Terry has been in prison, he has written or called myself or our daughter on numerous occasions. We both miss him and hope he will get out of prison someday. I would not feel threatened if he came back and lived near us.

I have read the foregoing statements and/or they have been read to me, and they are true and correct to the best of my knowledge and recollection.

Jenny Lee Williams
JENNY LEE WILLIAMS

Subscribed and sworn to
before me this 9th day
of April, 1988.

Francis J. Mantorana
NOTARY PUBLIC

My Commission expires:
March 27, 1992

AFFIDAVIT OF LAVERNE WILLIAMS

COMMONWEALTH OF VIRGINIA)
) ss
CITY OF DANVILLE)

Laverne Williams deposes and states:

1. I have been asked to give this affidavit by Terry Williams' attorney for use in his habeas corpus petition, and I give this affidavit willingly and freely.

2. I am 25 years old and Terry's youngest sister.

3. Though there is an age difference of approximately eight years between us, I have always felt close to Terry. When he lived at home, we would often garden together and walk to the store together.

4. Terry has never been a violent person. He has always been more likely to walk away from a tense situation than to let his anger get the better of him. His personality is pleasant and consistent. He starts conversations easily, smiles often, and always wants to know how I feel and what is on my mind. He occasionally becomes depressed, but never for very long.

5. Terry loves his daughter Jennie very much, and she loves him.

6. I have never known Terry to have a problem with drugs or alcohol.

7. Terry would sometimes ask me for money, but he never became angry if I could not give it to him. When I did lend money to him, he would pay back whatever he could.

8. After getting out of Chatham jail, Terry told me that he wanted to straighten himself out. He said that he hoped to have a stable life and a steady income some day.

9. Our family life was often difficult. Our father and mother drank a lot, and sometimes had violent fights. Dad would beat the children when he got drunk. When I was in my early teens, Dad finally quit drinking, stopped acting violently, and turned his life around. His drinking problem, and the behavior it caused, made life especially hard for Terry and my other brothers. They had no role model, no one to look up to.

10. We grew up in neighborhoods where drug use and crime are common. You never felt safe on the street. This created a lot of pressure on all the Williams children. We tried to survive as best we could.

11. I believe that Terry was forced or pressured into confessing to the murder of Mr. Stone. At around the time of the confession, he told me that the guards and the other inmates were giving him lots of trouble, and that he had been denied access to a doctor.

12. I cannot imagine that Terry actually committed the crimes for which he has been convicted. The Terry I know is not capable of doing such things.

I have read the foregoing statements and/or they have been read to me, and they are true and correct to the best of my knowledge

LAVERNE WILLIAMS

Subscribed and sworn to
before me this 9th day
of April, 1988.

NOTARY PUBLIC

My Commission Expires:
March 27, 1992.

AFFIDAVIT OF NOAH WILLIAMS

COMMONWEALTH OF VIRGINIA)
) ss
CITY OF DANVILLE)

I, Noah Williams, depose and state as follows:

1. Terry Williams is my younger brother, and his attorneys in his habeas corpus appeal have asked me to provide an affidavit. I do so freely and willingly;

2. I am a year older than Terry and grew up with him in Danville, Virginia. However, in 1985 and 1986, I was in the army and stationed at Fort Bragg, North Carolina. I currently live in Fayetteville, North Carolina. However, I still visit home often;

3. I left Danville to join the army in 1975 so I was out of the state in the army when Terry's various trials were held in Danville. However, I did get to speak to Terry's lawyer, Mr. Motley, during the appeal stage of Terry's conviction for the murder of Mr. Stone. We spoke for about 10 minutes. I asked Mr. Motley to explain to Terry all of his options. This was the first time I spoke with Mr. Motley;

4. Terry was mischievous as a child but I never saw Terry violent or vicious. Terry would do such things as sneak out of bed and stay out all night or sneak into someone's home and eat their food;

5. Terry would often be subjected to a beating from our father when he did something wrong. Sometimes the beatings would be real bad. Terry got more than his share of the beatings and much more than he deserved. Our father could also be very tough with a verbal lashing. It could be worse than the beatings;

6. Terry was so scared of the beatings that if he was a little late in getting home at night, he would try to stay away all night in fear of coming home and being beaten. Of course, that meant he would get even a worse beating when our father finally caught up with him;

7. Our father would often send the older brothers out to look for Terry at night. We would often find him in some of his familiar hiding places. We sometimes found him hiding under a house on Swanson Street or in a trunk by the side of a house in the neighborhood. He would beg us not to take him home because he was afraid of the beating he would get;

8. Notwithstanding the beatings he got from our father, Terry took our father's death very hard. He seemed to like having someone around to keep him in line;

9. Terry and our whole family were good friends with Mr. Stone. Terry often visited Mr. Stone and slept in his house. I never saw them fight;

10. I would have come home to testify on Terry's behalf if I had been asked to testify.

I have read the foregoing statements and/or they have been read to me, and they are true and correct to the best of my knowledge and recollection.

Noah Williams

Subscribed and sworn to
before me this 15th day
of January, 1988.

NOTARY PUBLIC

My Commission Expires:

_____, 19___.

AFFIDAVIT OF OLIVIA WILLIAMS

COMMONWEALTH OF VIRGINIA)
) ss
CITY OF DANVILLE)

Olivia Williams deposes and states:

1. I have been asked to give this affidavit by Terry Williams' attorney for use in his habeas corpus petition and I give this affidavit willingly and freely.

2. I am 37 years old and one of Terry's older sisters. There is an age difference of about four years between us.

3. As a child, Terry liked to play with other children. He was a normal kid until he fell off the school roof and hit his head. Somehow, that blow to the head changed his behavior. He started having problems and getting into more trouble.

4. When Terry was a small child, all the Williams children were taken from our parents and placed in foster homes. Mom and Dad were arrested and charged with neglect because of something which happened when they left us alone in the house one day. We managed to break open a bottle of liquor. A neighbor heard noise and called the police, who found us drunk and without supervision. After this, social services decided we would be better off in a different household.

5. In our first foster home, we were treated badly and were very unhappy. We were finally taken from this foster family and placed in a second home, where we were treated with kindness.

6. Mom and Dad eventually got their lives back together, and social services decided that we could go back home. We were away from our parents for about two or three years. I do not know how much Terry remembers about our time in the foster homes.

7. Mom and Dad drank a lot and sometimes had violent fights. This made home life hard even after the years in the foster homes.

8. I have never known Terry to have a drug or alcohol problem.

9. Terry has never been a violent person. I was shocked when he was convicted of murder. He is not the kind of man who is capable of doing such a thing.

I have read the foregoing statements and/or they have been read to me, and they are true and correct to the best of my knowledge and recollection.

OLIVIA WILLIAMS

Subscribed and sworn to
before me this 9th day
of April, 1988.

Francis J. Mastrama
NOTARY PUBLIC

My Commission Expires:
March 27, 1992.

AFFIDAVIT OF ORLANDO WILLIAMS

COMMONWEALTH OF VIRGINIA)
)
CITY OF DANVILLE)

I, Orlando Williams, depose and state as follows:

1. I am Terry Williams' older brother and have been asked to give this affidavit by his attorneys for use in Terry's habeas corpus appeal. I do so freely and willingly;

2. I am about two years older than Terry and grew up with him in Danville, Virginia. Terry went away to reform school at about age 11 or 12;

3. I never spoke to Terry's attorney, Mr. Motley. Nor did he or anyone else ask me to testify at trial. I would have testified if I had been asked. I currently live in Martinsville, Virginia and was living there at the time of trial;

4. Terry would get in trouble doing small things when he was young but I never saw him do anything violent nor did I ever see him attack anyone;

5. Terry would often stay out all night and be afraid to come home for fear of the beating he would get from our father. Our father could be very rough and deliver very bad beatings and Terry always seemed to get the worst of it. Terry would be so afraid of getting a beating that he would try to stay out all night. I and some of his other older brothers would often find him hiding under homes or in a box which stood beside a neighborhood house. He would often fall asleep in these hiding places;

6. Our whole family, including Terry, was friendly with Mr. Stone. Terry would often go to sleep at his house;

7. I recall seeing Mr. Stone in the summer before his death. His chest was bandaged and he told me he had hurt his back and side. I don't recall if he told me how he had hurt himself;

I have read the foregoing statements and/or they have been read to me, and they are true and correct to the best of my knowledge and recollection.

_____
Orlando Williams

Subscribed and sworn to
before me this _____ day
of _____, 1988.

_____
NOTARY PUBLIC
My Commission Expires:
_____, 19___.

*** Petitioner's Exhibit 34

REMARKS Terry Williams' social behavior has shown improvement, while his academic achievement has somewhat regressed. One day he can carry out any assignment, whereas the following day, he may lapse into daydreaming. This puzzling transition from one extreme to the other was evidenced in his California Reading Achievement Test score of 1.1, administered early in July, 1968. These results indicated that he put forth no effort and, therefore, fell far below his potential.

Socially, Terry has a normal peer and adult relationship for a boy of his age. He is somewhat talkative and active, but creates no special disturbances. Terry responds favorably to correction and seldom reacts in a hostile manner.

Terry is presently enrolled in our summer program. His progress remains the same.

Our plan for Terry is to continue working with him in our Remedial Program. Special Education is definitely recommended for this youth.

RECITATION PERIODS ARE 45 MINUTES IN LENGTH. PASSING GRADE OF THE SCHOOL IS D.

THE MARKING SYSTEM IS AS FOLLOWS:

A- OUTSTANDING
B- ABOVE AVERAGE
C- AVERAGE
D- BELOW AVERAGE
F- UNSATISFACTORY

DATE August 19, 1968

G. L. Stanley
EDUCATION SUPERVISOR

SUPERINTENDENT

ES 500

DANVILLE PUBLIC SCHOOLS
DANVILLE, VIRGINIA

HOME VISITATION FORM

Pupil's Name ...Jerry...Williams.....

Address .....

(In pencil)

Please write an informal report of visit to home. Some suggested points to consider are: home conditions, relationship between members of the family, attitude of parents toward school, problems of the child mentioned by parent, how teacher was received in home, economic status, etc. THIS REPORT TO BE FILLED OUT AFTER TEACHER VISIT AND NOT AT CHILD'S HOME. (Use more than one space if necessary.)

All Information Is Confidential

Date of visit: 2-20-61.. Teacher: ..Hughes Grade: ..P.P.I.. School: Grasty.

The children seem to be happy only when theyre in school and have things to enjoy with the other children. The parents show no interest in the school program nor the children. The children are without food and proper clothes often.

Date of visit: 4-22-62.. Teacher: ..Hughes Grade: ..P.P.I.. School: Grasty.

There have been general home visits & no avail in helping the child to get to school on time nor to attend regular. There are many home problems.

Date of visit: 3/13/62 Teacher: Layton Grade: P.P.II... School: Grasty

This children need special care. Their attendance is better, since it's late coming to school + without having any breakfast.

IN THE CIRCUIT COURT OF DANVILLE
COMMONWEALTH OF VIRGINIA

TERRY WILLIAMS,

Petitioner,

v.

J.D. NETHERLAND,
Mecklenburg Correctional Center,

Respondent.

AFFIDAVIT OF LIEUTENANT ANTHONY PARRISH

I, Lieutenant Anthony Parrish, having been duly sworn, do hereby state as follows:

1. I am a correctional officer at the Chatham Correctional Unit #15, Route 6, Box 50, Chatham, Virginia;

2. I have worked in the corrections field for 13 years;

3. I have been contacted by Linda J. Tarlow, an attorney for Terry Williams, and asked to give a statement regarding him;

4. I met Terry Williams when he was incarcerated at Camp 15 and supervised him while he worked in the kitchen;

5. Terry Williams was a good inmate. I knew him to be cooperative and well-mannered. I never saw him lose his temper. He was quiet by nature and did as he was told;

6. I believe Terry Williams never received any institutional charges at Camp 15. This is an unusual record for an inmate;

7. One incident I recall in particular is that another officer, Mr. Robinson, lost his wallet in the kitchen. Terry Williams found the wallet and returned it to Mr. Robinson. Terry

PETITIONER'S EXHIBIT 37

received a special letter in his file for his action, a copy of which is attached to this affidavit;

8. Terry never gave any problems to anyone at Camp 15, certainly not to me. I was very surprised when his lawyer told me that he was on death row for murder.

Lt. Anthony Parrish
Lieutenant Anthony Parrish

Sworn and subscribed to before me this 2nd day of June, 1995.

Charles B Crumpler
Notary Public

My commission expires:

March 31, 1999

ljt\tw\parrish.aff

COMMONWEALTH of VIRGINIA

C. R. WEBB
SUPERINTENDENT

[illegible]

[illegible]

January 31, 1985

MEMORANDUM

TO: Terry Williams, #133158

FROM: C. R. Webb, Supt.

SUBJECT: Letter of Commendation

Correctional Officer W. P. Robinson has brought to my attention that on 1-21-85 he lost his wallet while working in the kitchen. Officer Robinson reported that you found his wallet and returned it to him with all monies and other items still in place.

Your actions in returning this wallet intact demonstrated mature behavior on your part as well as good intentions. By means of this letter I hereby commend you for your actions and assure you that a copy of this letter will be made a part of your inmate record. Hopefully significant persons such as the Parole Board will be interested in reviewing such a letter.

CRW/ps

c.c. inmate file
file

Commonwealth of Virginia, City of Danville,--To-Wit:

To Any Police Officer of said City:

WHEREAS, C.L.Haraway, has this day made voluntary complaint and information on oath before me, the undersigned, of said City that Lulu Snipes Williams

on the 31st day of March, 1956, 195..., in said City, did unlawfully

Possesion of illegal whiskey

12 - 11 - x 1 Wis. - Va. 2.

6 - 1 - x-5 " 66.2W

THESE ARE, THEREFORE, in the name of the (Commonwealth of Virginia / ~~City of Danville~~) to command you forthwith to apprehend and bring before the Trial Justice Court of said City, the body of the said Defendant to answer said complaint and to be further dealt with according to law.

And you are hereby commanded to summon Haraway & Collie

to appear at the Trial Justice Court as a witness in the above case.

Given under my hand this 31st day of March, 1956, 195...

R. C. Shumaker

~~Clerk~~-Deputy Clerk-~~Complaint Officer~~

43048

*** Petitioner's Exhibit 38

Color W Sex M Age 31 Ht. 5'3" 120 Eyes Hair

Address 697 Beauregard St./City

Occupation None Married M Single

1609 V-40

COMMONWEALTH

{ V APPEAL

Lula Snipes Williams #5

TO MAY CO. 1957 (6TH)

~~1957 APRIL 29TH~~

FILED IN CLERK'S OFFICE

1957 MAY CO (14TH); CONSOLIDATED; JURY WAIVED; EVID HEARD BY COURT; FOUND GLTY; $10.00 FINE & 90 DAYS IN JAIL SUSP'D COND. O.B. 2 YRS (CONFINEMENT FOR NON-PAYMENT OF FINE & COSTS SUPERSEDED

Executed 2-26-57 Set For 3-1-57

Executed By Haraway--Talley Jr.

Jailed Jail Summoned

Date Bonded Bonded For

STATE FINES, ETC.

FINE	50	00
Costs: Clerk Corp'n Court	1	25
Jail Committal Fee		50
Warrant	1	00
Trial Fee	2	00
Auto fee		50
Commonwealth Att'ys Fee	5	00
TOTAL	60	25

3/1/57 - Guilty. Fined fifty dollars and cost. Ninety days in jail. Appeal noted.

March 1 1957

Judge

A COPY TESTE:
GERALD A GIBSON CLERK
BY Jean C Stephens
DEPUTY CLERK

Juvenile

Commonwealth of Virginia, City of Danville,—To-Wit:

To Any Police Officer of said City:

WHEREAS, T. C. Talley, Jr. Police Department, has this day made voluntary complaint and information on oath before me, the undersigned, of said City that Lula Williams, CF, 697 Beauregard St., City

on the 26th day of February, 1957, in said City, did unlawfully neglect her ~~[illegible]~~ infant childrenn, age 6 months, by violating Sec. 18-6 Code of Virginia. Amended to: neglect her infant child, Terry, age 1, by violating Sec. 18-6 Code of Virginia.

THESE ARE, THEREFORE in the name of the Commonwealth of Virginia to command you forthwith to apprehend and bring before the Juvenile and Domestic Relations Court of said City, the body of the said Defendant to answer said complaint and to be further dealt with according to law.

And you are hereby commanded to summon Haraway--Talley Jr., Police Dept.; T. E. Temple, City Manager; Nurse Allen, Health Dept.; M. T. Bennett, City Sergeant's Office; Dr. H. W. Harvey, 226 North Union St.

to appear at the Juvenile and Domestic Relations Court as a witness in the above case.

Given under my hand this 26th day of February, 1957.

Deputy Clerk
Juvenile and Domestic Relations Court

*** Petitioner's Exhibit 40

C&R-8

DEPARTMENT OF CORRECTIONS - ADULT SERVICES

PSYCHOLOGICAL SUMMARY CONFIDENTIAL

FILE NO.	NAME
133158	Williams, Terry

PSYCHOLOGICAL TESTS

INTELLIGENCE:
REVISED BETA NON-VERBAL IQ 86
OTIS Q-S VERBAL IQ _____
PERSONALITY: ~~16 PF TEST~~

FUNCTIONAL RATING BELOW AVERAGE
INTELLIGENCE CODE 2
BEHAVIORAL CODE 2

Bender Gestalt: House-Tree-Person

PSYCHOLOGICAL SUMMARY:

Williams was seen for psychological screening this date and is a 27 year old inmate of tested Below Average Intelligence whose previous psychological evaluations indicate that he functions within the borderline range of intelligence. It is noted in this regard that Williams currently appears to be functioning within the below average range and that this suggests that he has made gains in emotional development since the prior testing. He is currently serving an eleven year sentence for convictions of burglary and grand larceny and has a prior conviction for armed robbery for which he served approximately three years and was paroled from work release. It is noted that Williams appears to have experienced a traumatic, neglected childhood, that he had a number of problems in school and was committed to the state for a series of breakings and enterings as a juvenile. He obtained carpentry skills during the previous incarceration and hopes to obtain vocational training in food services in order to obtain employment on a more regular basis. He indicates that he was seen on a regular basis by a psychiatrist while at Beaumont. He has no history of self injury and no history of drugs or alcohol abuse.

Test and interview data this date are suggestive of an individual without ingrained criminal tendencies who lacks the coping skills necessary to function as an independent adult. He responds well to structure and appears to have made valuable gains in emotional growth in recent years but continues to show impulsive tendencies and a need for growth in the area of personal responsibility. He continues to be a good work release candidate and concern is expressed that this man could become institutionalized if imprisoned without opportunity for further growth and development.

Recommendation:

Assignment to Buckingham Correctional Center is recommended. He is not considered an escape risk and is not considered to be suicidal.

HISTORY OF HOSPITALIZATION ( ) YES: ( ) NO. RELEASE FORM SIGNED ( ) YES: ( ) NO.

INTERVIEWER Marsha Altizer, Chief Psychologist, BUCC DATE 4-25-82

Sister: Odessa Williams, age 22, lives at the family residence. She has a high school education and is single with no dependents. She has no known police record.

Sister: Laverne Williams, age 19, lives at the family residence. She is a student at Danville Community College and is single with no children. She has no known police record.

There is no record in this family of any mental illness. There is no known alcohol problem except for the fact that the subject's father was an alcoholic. Subject's brother, O'Harold Williams, was found guilty in 1974 of drug sales. There is no history, however, of any drug abuse in this family.

DOMESTIC AND ENVIRONMENTAL SUMMARY:

Terry Williams was born on September 11, 1955, in Danville, Virginia. He has lived his entire life in Danville and was raised by his parents. His father died in 1980. He has continued to live with his mother. During the years Terry was growing up, he had quite a few problems as a juvenile. He has been in and out of Juvenile Court from 1966 through 1971. He was on juvenile probation and was also committed to the State Department.

Subject states he has a good relationship with his brothers and sisters and also gets along fine with his mother at the present time. It should be noted, however, that in 1957 the subject was classified as a dependent and neglected child and was placed in the temporary custody of the Court. Terry was returned to the custody of his parents in 1959.

MARITAL HISTORY:

The defendant married Jenny Lee Childress in Chatham, Virginia, in 1973. They separated in 1976. His wife is 27 years old, has a high school education and currently lives on Colquohoun Street in Danville. They had one child, Jeannie Williams, age 3, who lives with his mother. The defendant stated that he used to make support payments but does not at the present time.

EDUCATION:

The last school subject attended was O. T. Bonner Junior High School from September of 1970 to February 10, 1971, at which time he was sent to Beaumont. He did not finish the seventh grade at Bonner. During this time the subject was in special education classes. The last grade completed was the sixth grade. Subject repeated the second and the sixth grades. Subject was assigned to junior high school during the 1969-70 school year because of his age but he was working on a fifth grade level. Subject currently functions intellectually on a borderline level.

EVALUATIVE SUMMARY:

Terry Williams has been sentenced to serve eleven years in the Virginia State Penitentiary by a jury on convictions of burglary and grand larceny. Subject has a lengthy prior record. However, most of his offenses were committed while he was a juvenile. He has been on juvenile probation and adult probation. He has also been on parole and finished his parole on August 11, 1982. The present offense was committed less than a month later on September 7, 1982. His prior Penitentiary number was 111995.

The defendant comes from a large family and apparently has not had much parental supervision. He has been committed to the State Department as a juvenile and apparently while growing up he just roamed the neighborhood both night and day. His former juvenile probation officer stated that subject had a rugged home life and had not had any supervision. Subject has a limited education and seems to function on a dull-normal or borderline mentality. His employment record shows that he has had numerous jobs but he doesn't stay with any one job for very long. Subject has been married and is now separated. He has one child which he does not support.

Concerning the present offense, subject places most of the blame on his companion, Calvin Eugene Swann. Terry states that he was just helping a friend when he got into this trouble. Williams has not accepted any responsibility for his actions in the present offense.

TENTATIVE PLACEMENT PLAN:

Subject's future plans are that after serving his time, he wants to go to a halfway house in Richmond and try to be on work release in the Richmond area. He indicated no future plans to return to Danville. If he does return to Danville, he would live with his mother, Lula Williams, at 202 Henry Street, with employment to be secured.

R. Ken Poteat, Jr.
Probation and Parole Officer

RKP/ac

Enclosure: Prior Record

[redacted]

DGL 806 Attachment A
July 1, 1981

#28

DEPARTMENT OF CORRECTIONS
ADULT INSTITUTIONAL SERVICES

Good Conduct Allowance Class Change Form

Inmate WILLIAMS, Terry Number 133158

Institution Buckingham Correctional Ctr. Housing Assignment

Old GCA Class N/A New GCA Class II Effective Date of Class Change 5-3-83

I. Recommendation ( ) or Change in Status ( ). (Check one and complete Part A or B)

A. Signature, Adjustment Committee Chairman _____ Date _____

B. Signature, ICC Chairman [signature] Date 5/3/83

If change in status, specify reason for change

RECEIVED
MAY 20 1983
PATRICK HENRY CORRECTIONAL

II. Warden/Superintendent Review

GCA Class Change is: ✓ Approved ____ Disapproved

5/5/83
Date

Fred L. Finkbeiner
Warden/Superintendent's Signature

DOC CL-20 (Revised)

INSTITUTIONAL CLASSIFICATION COMMITTEE REPORT

CASE NUMBER: 133158 INSTITUTION: HALIFAX CORRECTIONAL UNIT #23

INMATE NAME: WILLIAMS, TERRY

Hearing at request of: (XX) Inmate ( ) Adjustment Committee ( ) Director ( ) HEARING DATE: 11/08/84
(Check one only) ( ) Institution Administration ( ) CCB

I. ADMISSION AND OTHER DATA

Date of Admission: 3/17/83
Crime(s): BURGLARY, (2) GRAND LARCENY Date of arrival at present location: 9/21/83
E.D.: 2/21/88 PED: 4/08/85 Total sentence: 11 yrs. ____ mos. ____ da
DOB: 9/11/55 Detainer status: NONE Number of previous felony convictions: ONE
Custody status: B Medical status: A
Date assigned: 3/17/83

II. NATURE OF HEARING REQUEST (If due process hearing, attach copy of hearing notice and Due Process Hearing Check list

Type of hearing: (X) ( ) Custody Increase ( ) Custody Decrease ( ) Transfer ( ) Work/Study Release ( )

Transfer.

III. SUMMARY STATEMENT OF INMATE (Where applicable, include summary statement of witnesses and reporting officer ( ) see continuation

Two inmates threatened me over some drugs and I cannot return to the population. I would like to go to Unit #15, so I will still be close to my family.

IV. SUMMARY STATEMENT OF COMMITTEE AND RECOMMENDATIONS (Include rationale) ( ) see continuation

The committee read the letter subject wrote setting forth inmate's names that allegedly threatened him. Subject reported names of individuals that were involved in drugs at this Institution. An investigation revealed that information the subject submitted was correct and charges were brought against one of the individuals named. The committee recommends a transfer for subject preferably to Unit #15, in order to facilitate visitation privileges and in order to remove him from present situation.

Subject will remain on Protective Custody status until action is taken on committee's recommendation.

( ) see continuation

Members present: (1) [signature] /Chairman (2) [signature] (3) [signature]
Administration: ( ) Approval ( ) Disapproval Date 11-8-84 BY: _____
Title

CENTRAL CLASSIFICATION BOARD ACTION

RE: _____

( ) ICC Action Approved ( ) ICC Action Disapproved ( ) No Change In Assignment
( ) Transfer Approved To _____ ( ) Custody Recommendation Approved/Disapproved
( ) Case Set for Rehearing _____ By ( ) ICC ( ) CCB

RED to Unit 15 11/9/84

Frank B. Madsen for
James P. Mitchell, Regional Administrtator

598

Meeting Chairman | Supv. State Inst. Class. | Manager, CRU

DOC CL-20 (Revised)

INSTITUTIONAL CLASSIFICATION COMMITTEE REPORT

SE NUMBER: 133158 INSTITUTION: Halifax Corr. Unit #3

MATE NAME: Williams, Terry HEARING DATE: 8/21/84

Hearing at request of: (X) Inmate ( ) Adjustment Committee ( ) Director ( )
(Check one only) ( ) Institution Administration ( ) CCB

I. ADMISSION AND OTHER DATA

Date of Admission: 3/17/83 Date of arrival at present location: 9/21/83
Crime(s): Burglary Total sentence: 11 yrs. ____ mos. ____ days
D.D.: MD-2/21/88 PED: 1/8/85 Number of previous felony convictions: ____
DOB: 9/11/55 Detainer status: none known Medical status: A
Custody status: B Date assigned: 5/83

II. NATURE OF HEARING REQUEST (If due process hearing, attach copy of hearing notice and Due Process Hearing Check list.)

Type of hearing: ( ) ( ) Custody Increase ( ) Custody Decrease (X) Transfer ( ) Work/Study Release ( )

Inmate requested transfer.

( ) see continuation

III. SUMMARY STATEMENT OF INMATE (Where applicable, include summary statement of witnesses and reporting officer.)

Interested in a transfer to NCCC—interested in studying sheet metal work.

( ) see continuation

IV. SUMMARY STATEMENT OF COMMITTEE AND RECOMMENDATIONS (Include rationale)

ICC gave consideration to this request and the record. Williams is in the unit's RSA educational program and making progress. He has a good adjustment record overall; no violations. He has completed about 11 months on the unit, and is eligible for this transfer.

The committee recommends approval of this transfer.

RECEIVED
H. C. U. #23

(X) see continuation

Members present: (1) [signature] /Chairman (2) C L Parsons (3) Joseph L Coleman

Administration: (X) Approval ( ) Disapproval Date 8-22-84 BY: [signature] Title [illegible]

CENTRAL CLASSIFICATION BOARD ACTION

DATE: 9/5/84 (X) NO ACTION.

( ) ICC Action Approved ( ) ICC Action Disapproved ( ) No Change in Assignment
( ) Transfer Approved To ____ ( ) Custody Recommendation Approved/Disapproved
( ) Case Set for Rehearing ____ By ( ) ICC ( ) CCB

(X) CCB NOTES INMATE'S POSITIVE RECORD AT # 23; HOWEVER, RACIAL OF TRANSFERS TO NCCC WILL CAUSE LENGTHY DELAY. CCB WOULD LIKE OTHER OPTIONS.

[signature] [signature] [signature]
Meeting Chairman Supv. State Inst. Class. Manager, CRU

COMMONWEALTH of VIRGINIA

January 31, 1985

MEMORANDUM

TO: Terry Williams, #133158

FROM: C. R. Webb, Supt.

SUBJECT: Letter of Commendation

Correctional Officer W. P. Robinson has brought to my attention that on 1-21-85 he lost his wallet while working in the kitchen. Officer Robinson reported that you found his wallet and returned it to him with all monies and other items still in place.

Your actions in returning this wallet intact demonstrated mature behavior on your part as well as good intentions. By means of this letter I hereby commend you for your actions and assure you that a copy of this letter will be made a part of your inmate record. Hopefully significant persons such as the Parole Board will be interested in reviewing such a letter.

CRW/ps

c.c. inmate file
file

COMMONWEALTH of VIRGINIA

W. J. TOWNLEY
SUPERINTENDENT

Department of Corrections
Division of Institutional Services
Halifax Correctional Unit

November 27, 1984

Mr. C. Webb, Superintendent
Chatham Correctional Unit #15
Route 6, Box 50
Chatham, Virginia 24531

Re: Terry Williams
No: 133158

Dear Mr. Webb:

The above-named individual was transferred to your Institution upon alleged threats made against him.

Prior to leaving this Institution, he submitted information about drug trafficking within the Institution. The information given was investigated by Institutional authorities and proven to be correct. In fact, the Department Investigators have entered the case.

The information Williams submitted was certainly the main factor the Administration needed to stop a large quantity of drugs from entering the Institution.

I would ask that you relay to Williams our appreciation for alerting us to this situation. Not only did this show the concern he had for himself, but also the concern he had for others.

I would appreciate you making this a part of his file for future reference.

Your cooperation in this matter will be appreciated.

Sincerely,

W. J. Townley
Superintendent

WJT:an
cc:file

*** Petitioner's Exhibit 48

COMMONWEALTH of VIRGINIA

CENTRAL STATE HOSPITAL
P.O. Box 4030
Petersburg, Virginia 23803

DEPARTMENT OF
MENTAL HEALTH AND MENTAL RETARDATION

Telephone (804)-861-7000

August 11, 1986

Mr. E. L. Motley, Jr.
Attorney at Law
Masonic Building
Danville, Virginia 24541

RE: WILLIAMS, Terry
Reg. No. 104041

Dear Mr. Motley:

Enclosed, please find a copy of the reports to the Court indicating the opinions of Dr. Ryans and myself as to his competence to plead and stand trial and assist in his own defense. The full report, with reference to 19.2-169.5 and 19.2-264.3 is the opinion of both Dr. Ryans and myself.

Your client continued to maintain his innocence of the alleged crime of capital murder and insisted that his statement to the police did not represent a true occurrence, but rather disturbing dreams that he had. Nevertheless, it is our opinion that your client, Mr. Terry Williams, knowingly, willingly, intelligently and voluntarily gave his statements to the police. He denies now that he ever entered the house of the victim, although he says that he did enter two times to talk with the victim's daughter, Dee Dee. He claims that he called the police after the death of the victim in order to determine the victim's cause of death because the victim had always appeared healthy and your client could not believe that he had died of a heart attack.

In any event, your client does not claim that the alleged crime was due to defect of reason due to disease of the mind or defect of the mind so as not to know the nature, character or consequences of his acts or the difference between right and wrong. Neither does he claim that he was suffering from an irresistible impulse or loss of volition due to disease of the mind or defect of the mind at the time of the alleged crime or crimes. He claims, simply, that he is innocent, by reason of not having committed the crime.

A repeat Rorschach shows no signs of mental illness. It also shows no signs of hostility or aggression. It is, therefore, our opinion that, though there are no mitigating factors for your client (with refernece to 19.2-264.3 and 264.4) that his psychological make-up is such that there is a low probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society. We are unable to determine (because your client will not tell us) whether and how much he was under the influence of marijuana at the time of the alleged crimes.

PSYCHOLOGICAL EVALUATION
Terry Williams - Outpatient
June 30, 1986

Sent to Hanover when he was about 12 or 13 for B&E's of stores and schools and taking bicycle; was there about 6 to 8 months and came home; after about 6 months, was sent to Beaumont for doing the same things; was there 6 to 8 months and came home, about age 17 or 18; went to the Job Corps in Cottonwood, Idaho; quit one time but returned and received a certificate in basic carpentry and maintenance, about 73; after this, married and worked in Dan River Mills and also at the same time in a bakery; was fired from the Mills for sleeping on the job; worked construction but was too slow; then worked in a tobacco warehouse.

Married Jenny Childress when both were 18; they have a daughter; they separated before he went to the pen in 76; there has been no divorce.

Was convicted of armed robbery in 76 of a person; pled guilty and received 8 years; did 4 years and made parole in 80; was convicted of B&E and GL of a house and received 11 years; claims that his co-defendant had asked him to move his belongings from his girl friend's house; the son of the owner of the house came back while they were there and beat the patient up; he made parole in 3 years and got out on 4/8/85; stayed with his mother; worked on and off in the railroad and, after the lay off, in roofing.

Was charged with robbery of a watch from a person on 3/28/86; has been in jail ever since; says he is innocent but found guilty even though the accuser never showed up in court and he was given 60 days on 6/16; however, while still in jail, on 5/25 in the morning, wrote a letter to the chief of police confessing some crimes; detectives came and took a statememt that afternoon; the patient now claims that his confessions were based on dreams that he had and that actually he is innocent of everything he confessed. He is charged with 2 auto thefts and 1 malicious wounding; he has not been charged with the murder he confessed to and the stabbing of the man whose house was burned.

He was questioned on roles and functions: your lawyer (E.L. Motley); what does a defense lawyer do (he supposed to convince the judge that I'm innocent); who is the CWA (Mr. Filler); his job (he is the prosecuting attorney; he convince the judge or the jury that the man is guilty ; tries to anyway); what does the judge do (he listen to the case and he decides the penalty); number in a jury (6 or 11); what do they do (they listen to both sides of the testimonies and they render (sic) their decision; guilty or not guilty); pleas (guilty or not guilty, all I know); have you heard of NGRI (like the dude was out of his mind; like he had been to a mental institution); if found not guilty (get to go home); if found guilty (they be sentenced); if found NGRI (they send them to a mental institution); plea bargaining (when they make a deal with the police; know some drug dealers and get a lighter sentence); appeal (means you're not satisfied with the sentence they gave you and you want another trial or whatever; want case reviewed to another judge)..

TEST RESULTS:

On the WAIS-R, he scored a Verbal I.Q. of 74, Performance I.Q. of 75 and a Full-Scale I.Q. of 73 placing him in the borderline level of intelligence; his scores were fairly even throughout and it is believed that his test scores adequately reflect his

PSYCHOLOGICAL EVALUATION
Terry Williams - Outpatient
June 30, 1986

TEST RESULTS CONTINUED:

intellectual functioning level; his reading is quite impaired; on the Bender-Gestalt, administered with a 10-second exposure and reproduction from memory, he showed no signs of organicity or brain damage affecting intellectual functioning; on the Rorschach, he showed no signs of organicity, psychopathology affecting thinking, affect or behavior, disorganization of thinking or deep depression; his responses were consistent with his intellectual functioning level and he shows some signs of impulsivity.

SUMMARY:

This 30-year-old black male is charged with 2 counts of auto theft and 1 of malicious wounding and has given statements to the police. He now claims that the statements are not valid because he was only telling them what he had dreamt. Both on interview and psychological testing, it is clear that the patient is malingering mental illness he tests at the borderline level of intelligence and it is believed that that is the level he is functioning in. It is believed the patient is competent to plead and stand trial and was competent at the time of the alleged crime or crimes and was returned to jail with the deputy who brought him.

Arthur Centor, Ph.D.

Arthur Centor, Ph.D.
Licensed Clinical Psychologist
Forensic Unit

AC/sw

Received: 6/30/86
Typed: 7/11/86

IN THE CIRCUIT COURT OF DANVILLE
COMMONWEALTH OF VIRGINIA

TERRY WILLIAMS,

Petitioner,

v.

CHARLES THOMPSON,
Mecklenburg Correctional Center,

Respondent.

Commonwealth of Virginia

County of Patrick ss

AFFIDAVIT OF DR. ROBERT S. BROWN, SR.

I, Dr. Robert S. Brown Sr., do hereby depose and state as follows:

1. I am a Forensic Psychiatrist currently in private practice in Charlottesville, Virginia. I am also a Clinical Associate Professor of Psychiatry at the University of Virginia School of Medicine. My resume is attached to this declaration as Exhibit A.

PETITIONER'S EXHIBIT 50

2. I have reviewed the following reports and records in the above captioned case:

(1) Clinical Evaluation of Terry Williams by Dr. Paul A. Mansheim, undated

(2) Medical Records, Central State Hospital, 7/29/86 through 8/11/86.

(3) Medical Records, Memorial Hospital, Danville, Virginia, 6/23/86

(4) Medical Records, Memorial Hospital, Danville, Virginia, 8/14/85

(5) Medical Records, Memorial Hospital, Danville, Virginia, 6/3/85.

(6) Medical Records, Memorial Hospital, Danville, Virginia, 9/23/88, Terry Williams treated for "hit in the head" and "passed out."

(7) Medical Records, Danville, Virginia, 9/9/82.

(8) Medical Records, Memorial Hospital, Danville, Virginia, 9/8/82.

(9) Medical Records, Memorial Hospital, Danville, Virginia, 6/27/80.

(10) Medical Records, Memorial Hospital, Danville, Virginia, 4/8/69.

(11) Report of Autopsy, Office of the Chief Medical Examiner, Western District, Roanoke, Virginia, 7/1/86: Decedent - Harris T. Stone.

(12) Certificate of Analysis, Bureau of Forensic Sciences, Western Laboratory, Roanoke, Virginia, 11/8/85. Examiner, Richard J. McGarry.

(13) Report of Investigation by Medical Examiner, Decedent, Harris Thomas Stone, 11/4/85.

(14) Trial Testimony of the following individuals who saw Mr. Stone's body the night of his death:
Garnett Bowman (pp. 170-280);
John Whittle (pp. 180-187);
Joseph White (pp. 187-189);
Jannadean Stone (pp. 189-208 and pp. 285-

286)
Gloria Jean Womack (pp. 208-212)
Officer J. T. Poteat (pp.217-220)

(15) Trial Testimony of individuals who examined or who were involved in examining the body of the victim in a professional capacity:
Jack Miller (pp. 221-232)
Capt. C. W. Howerton (pp. 232-234 and pp. 261-262)
Dr. Thomas Joseph Hardy (pp. 234-257)
Dr. David Oxley (pp. 262-285)

(16) Affidavit of Martha Hampton, Terry Williams' girlfriend

(17) Certificate of Death, Commonwealth of Virginia, Decedent, Harry Thomas Stones, 11/12/85 and amended on 2/13/86

(18) Virginia Department of Corrections Post-Sentence Report

(19) Terry Williams, Anonymous letter to police containing confession

(20) Terry Williams' confession, 4/25/86 at 4:35 P.M.

(21) Terry Williams' confession, 4/25/86 at 4:45 P.M.

(22) Terry Williams confession, 4/25/86 at 5:20 P.M.

(23) Terry Williams' confession, 4/25/86 at 5:49 P.M.

(24) Terry Williams' confession, 4/25/86 at 5:58 P.M.

(25) Terry Williams' confession, 4/25/86 at 6:14 P.M.

(26) Terry Williams' confession, 4/25/86 at 6:25 P.M.

(27) Terry Williams' Recantation, 4/28/86.

(28) Report of Dr. Arthur Centor, 6/27/86.

(29) Report of Dr. Arthur Centor, 6/30/86.

(30) Report of Dr. Arthur Centor, 8/1/86.

(31) Report of Dr. Arthur Centor to Defense Counsel, 8/11/86.

(32) Report of Dr. Arthur Centor to The Honorable James F. Ingram, 8/11/86

(33) Report of Dr. Arthur Centor, 8/22/86

(34) Handwritten Report of Dr. Arthur Centor, 9/9/86

(35) Report of Dr. Arthur Centor to Judge Ingram, 9/10/86, (typed and handwritten).

(36) Report of Dr. Arthur Centor to Defense Counsel, 9/10/86

(37) Report of Dr. Paul A. Mansheim, 9/16/86

(38) Testimony of the Following Witnesses who testified about Mr. Williams' competence or his future dangerousness in the sentencing phase of his trial:

(1) Dr. Arthur Centor, pp. 361-376 and pp. 682-695
(2) Dr. Miller M. Ryans, pp. 376-385 and pp. 672-682)
(3) Dr. Paul A. Mansheim, pp. 425-433, pp. 571-581 and pp. 584-590

(39) Terry Williams' Testimony in Suppression of Confession Hearing, pp. 401-424

(40) Affidavits of Bruce Elliott, Lavine Williams (Defendant's sister), Olivia Williams (Defendant's sister), Noah Williams (Defendant's brother), Orlando Williams (Defendant's brother), Jenny Childress Williams (Defendant's wife), Jennie Williams, (Defendant's daughter),

(41) School records

(42) Institutional records

3. In my professional judgement, the evaluations performed by Dr. Arthur Centor, Dr. Paul Mansheim and Dr. Miller M. Ryans, were superficial and inadequate and thus could not provide the foundation for their conclusions that Terry Williams was competent to stand trial, was of sound mental state at the time of the alleged offenses or his statements to the police or was a future danger to society.

4. For example, it is evident from Dr. Mansheim's report, entitled "Clinical Evaluation" which he performed as an

"Independent Evaluation for the Defense" that he spent a minimal amount of time with Mr. Williams. His two page report is little more than a summary of the Defendant's past criminal record. He devoted three and one-half sentences to the Defendant's developmental history and educational history and one sentence to his marital history. Furthermore, Dr. Mansheim failed to conduct a mental status examination which is considered by all psychiatrists to be an essential and crucial part of any psychiatric examination. Finally, Dr. Mansheim reached the diagnosis of "unsocialized aggressive conduct disorder." First of all, there is no such diagnosis as "unsocialized aggressive conduct disorder." There is a diagnosis correctly entitled, "Conduct disorder, undersocialized, aggressive" which has a diagnostic code of 312.00. On the accompanying sheet that Dr. Mansheim sent in with his evaluation, he circled Diagnostic Code 312.23 which has a diagnosis of "Conduct Disorder, Socialized, Aggressive." Either of these diagnoses is inappropriate in this case and neither of them is supported by anything in Dr. Mansheim's report. Conduct disorders are ordinarily included in disorders usually first evidenced in infancy, childhood or adolescence. I think that it is only fair to conclude, on the basis of the brief report prepared by Dr. Mansheim, that he did not spend a sufficient minimal amount of time with Mr. Williams despite the fact that the Defendant was charged with Capital Murder.

5. Dr. Centor, a Central State Hospital Psychologist, administered a battery of psychological tests to the Defendant, the first part of which was administered on June 30, 1986 and the following portions were administered while the Defendant was an in-patient at Central State Hospital between July 29, 1986 and August 11, 1986. In Dr. Centor's letter to Mr. E. L. Motley, Jr., Attorney for the Defendant, dated August 11, 1986, Dr. Centor said that the Defendant's Rorschach "shows no signs of hostility or aggression. It is therefore our opinion that, though there are no mitigating factors for your client (with reference to 19.2 - 264.3 and to 264.4) that his psychological make-up is such that there is a low probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society."

6. Despite Dr. Centor's conclusion of "a low probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society," he nonetheless testified at the Defendant's trial, as indicated on page 692 of the transcript of that trial of Capital Murder, "it is my opinion that the Defendant, Mr. Williams, shows a high probability of committing criminal acts of violence that would constitute a continuing serious threat to society...."

7. Dr. Centor went on to say in the same paragraph of the

transcript of his testimony at the Defendant's trial that his opinion was based on his psychological evaluation in addition to other things such as the Defendant's history and frequency of offenses.

8. Dr. Centor's psychological test battery is substantially inadequate in the evaluation of this particular Defendant based upon his history of two significant injuries to his head which are documented in medical records which this examiner reviewed. Dr. Centor failed to administer the Halstead-Reitan Neuropsychological Test Battery which is indicated for Defendants with a history of significant head injuries. Such a battery of tests in this examiner's opinion were highly indicated, would have shown a high impairment index and should have been performed in association with appropriate diagnostic radiographic studies including either the CT of the head or an MRI of the head of the Defendant.

9. Dr. Centor's battery of psychological tests failed to include academic measures, evaluation of memory functions, assessment of language functions and sensory perceptual examination. It is a well known fact that head injuries are often associated with impaired functioning of the brain which can be measured by an adequate battery of neuropsychological tests and structural damage to the brain which can only be measured by appropriate radiographic studies as mentioned above.

10. Dr. Centor found that the Defendant had a "borderline intelligence." As a matter of fact, the Defendant's IQ was found at the extreme low end of Borderline Intellectual Functioning based on the Defendant's responses to the Wechsler Adult Intelligence Scale - Revised. The Standard Error of Measurement for this examination has a score of 3 on Verbal Functioning and 4 on Performance Functioning. It is therefore just as likely that the Defendant is functioning in the Mental Retardation range of intelligence as opposed to the low end of Borderline Range of Intelligence based on the Standard Error of Measurement.

11. The limitations of the Wechsler Adult Intelligence Scale such as the Standard Error of Measurement was not described by Dr. Centor.

12. The Defendant was in jail for stealing a watch at which time he confessed on 4-25-86 without the presence of an attorney in a two and one-half hour period both to the instant crime and to others. This examiner raises serious question with the Defendant's capacity to confess based on his probable mental retardation, a history of head injuries, the absence of appropriate neuropsychological and radiographic studies to measure the extent of impairment based on his injuries, and the

failure on the part of his evaluators to determine his degree of suggestibility.

13. The Defendant "confessed" based on his self-report that he dreamt about the crimes in question. His description of his dreams suggests the possibility of serious neurological impairment inasmuch as his dreams frequently took on the characteristics of nightmares. He did, in fact, have a normal neurological examination and a normal electroencephalographic study. The EEG was "sleep deprived." The purpose of sleep-deprived EEG in this examiner's experience is to observe the stability of brain functioning during the delicate state of the brain between sleeping and waking. In other words, the purpose of the sleep-deprived EEG is to observe the patient falling into sleep repeatedly and the effects of falling from wakefulness into sleep on the brain functioning. In the case of the Defendant, while he did have a sleep-deprived EEG, there was no report of sleep occurring during the examination itself and thereby the test was invalidated. The report simply said that he experiencd brief episodes of drowsiness but there is no report that the Defendant actually fell asleep and therefore the sensitivity of the test was invalidated. On 8/11/86, the Central State Hospital Staff recorded, "EEG was traced without sleep recorded."

14. The Defendant was found to have a positive test for syphilis while he was at Central State Hospital. Syphilis may effect neuropsychological functioning. The extent to which syphilis has affected the Defendant's brain functioning has not been determined.

15. Dr. Centor testified at the Defendant's trial as indicated by transcript p. 687, that the Defendant "claimed that he was hearing voices and that he was having visual hallucinations too, but there are certain tests for these people who claim to hear voices and people who claim to see things that are not there, and on both of these tests, it showed that his claim was not substantiated or that it was not true, that his claim was not one that was based on reality." The examiner is aware of no "tests" to determine the presence of visual or auditory hallucinations short of a PET Scan, a highly technical largely experimental instrument which shows alternations in metabolism of the brain in some Schizophrenic patients who are undergoing psychotic episodes which include hallucinations. It is this examiner's opinion that Dr. Centor misled the jury by suggesting to them that there are, in fact, "tests" that are ordinarily used by psychologists or psychiatrists to determine the presence of altered states of thinking such as hallucinations. They simply do not exist and they are not used on a regular basis in forensic psychiatric evaluations but are more in the province of experimental research at this particular stage in the development of the behavioral sciences.

16. None of the examiners, including Dr. Centor, Dr. Ryans or Dr. Mansheim spent an adequate amount of time developing the Defendant's psychological background history. Had they done that, they would have learned that the patient had been badly beaten by his father as a child. They would have learned that he has a large number of siblings who were willing and able to testify to the Defendant's chaotic family background which, in this examiner's opinion, would have served as important factors in mitigation. There is no evidence of record available to this examiner that any member of the Defendant's family was carefully examined by the evaluators.

17. It is, therefore, this examiner's conclusion that:

(1) The Forensic Psychiatric and Psychological Evaluations of the Defendant were, at best, cursory and superficial;

(2) There was inadequate history and observation to determine whether the patient was competent to confess;

(3) There was an inadequate evaluation to determine whether the patient was competent to stand trial;

(4) There was inadequate evaluation to determine the Defendant's mental status at the time of the offense; and

(5) There was inadequate evaluation to determine the extent of the Defendant's mitigating circumstances.

18. It is, therefore, necessary that the Defendant be more adequately studied at an institution where the appropriate examinations can be administered. I am in a position to provide a Comprehensive Forensic Evaluation and I have negotiated with the University of Virginia Hospital where a complete neurological and neuropsychological study can be performed.

19. Owing to the requirement of highly technical studies which the Defendant's condition requires, it will be essential that he be examined in Charlottesville where psychological, neuropsychological and psychiatric examinations can be conducted in the examiner's office, a facility which is accustomed to the safe and secure management of forensic cases and where at least one other defendant in Mr. Williams' situation has been previously evaluated. Radiographic and other special studies will be performed at the University of Virginia Hospital which is located near the examiner's office.

I have read the foregoing statement and declare, under penalty of perjury, that it is true and correct to the best of my knowledge and belief.

Robert S. Brown Sr.

Robert S. Brown, Sr., Ph.D., M.D.
Diplomate, American Board of
Psychiatry and Neurology
Diplomate, American Board of
Forensic Psychiatry

Subscribed and Sworn to before me this 13th day of August, 1988.

Joann P. Rose

Notary Public

My Commission expires on May 3 1992

IN THE CIRCUIT COURT OF THE CITY OF DANVILLE
COMMONWEALTH OF VIRGINIA
COUNTY OF PATRICK

TERRY WILLIAMS Petitioner, v. CHARLES THOMPSON, Mecklenburg Correction Center, Respondent.	LP 88-81 HABEAS CORPUS

AFFIDAVIT OF
DR. ROBERT S. BROWN, SR.

I, Dr. Robert S. Brown, Sr., do hereby depose and state as follows:

1. I am a Forensic Psychiatrist currently in private practice in Charlottesville, Virginia. I am also a Clinical Professor of Psychiatric Medicine at the School of Medicine at the University of Virginia. I have previously provided two affidavits which, I understand, have been submitted to the Court on behalf of Petitioner.

2. As stated in my previous affidavit, I believe it is necessary to examine Terry Williams in a hospital in order to perform adequate neurological and neuropsychological examinations.

3. I did examine Mr. Williams at the Mecklenburg Correction Center on February 24, 1993. I did this upon the request of Terry Williams' attorneys who indicated that the Court had urged that, to the extent possible, we conduct an examination at the facility.

PETITIONER'S EXHIBIT 52

4. During my visit with in February 1993 I conducted a two and a half hour forensic psychiatric session with Terry Williams and administered a battery of psychological tests.

5. While this examination of Mr. Williams was a start, it was incomplete (due to the inability to conduct examinations which require certain equipment) and inconclusive. My opinion has not changed that a much more comprehensive examination is needed. And, as I previously stated, the examination cannot be conducted at the correctional facility.

6. Specifically, the following is necessary to properly evaluate Mr. Williams' condition:

a. Neurological examination with electroencephalogram and CT scan;

b. Neuropsychological examination; and

c. Cerebral spinal fluid test for syphilis

7. These examinations and tests can be performed at the University of Virginia in a period of one full day.

8. As I previously stated, given Mr. William's history of head injuries and the possibility of organic brain damage, the neurological and neuropsychological examinations are critical. Moreover, the possibility that Mr. Williams suffered from untreated syphilis dictates a cerebral spinal fluid test.

9. I have read the foregoing and it is true and correct to the best of my information and knowledge.

Robert S. Brown, Sr.
Ph.D, M.D.
Diplomate, American Board of Psychiatry and Neurology
Diplomate, American Board of Forensic Psychiatry

Subscribed and sworn to before me this 18th day of November, 1993.

Deborah A. Hall
Notary Public

My Commission Expires: 6/21/94

IN THE CIRCUIT COURT OF DANVILLE
COMMONWEALTH OF VIRGINIA

TERRY WILLIAMS, Petitioner, v. CHARLES THOMPSON, Mecklenburg Correctional Center, Defendant.	LP 88-81 HABEAS CORPUS

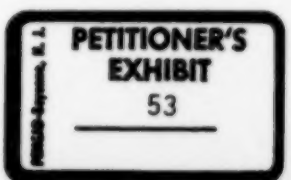
AFFIDAVIT OF DR. ROBERT S. BROWN, SR.

I, Dr. Robert S. Brown, Sr., do hereby depose and state as follows:

1. I am a Forensic Psychiatrist currently in private practice in Charlottesville, Virginia. I am also a Clinical Professor of Psychiatric Medicine at the School of Medicine at the University of Virginia. I have previously provided three affidavits which, I understand, have been submitted to the Court on behalf of Petitioner.

2. I have reviewed the affidavit of Brian A. Powers and have spoken by telephone with Linda Tarlow regarding new information concerning the consumption of alcohol by Lula Williams, mother of the Petitioner.

3. After reviewing this information it is my opinion that the Petitioner suffers from Fetal Alcohol Syndrome or Fetal Alcohol Effect. In my opinion it would be impossible for a pregnant woman to consume the amount of alcohol Mrs. Williams consumed during her pregnancy with the Petitioner, without adversely affecting the fetus.



4. It is my observation that Petitioner manifests many of the symptoms of fetal alcohol damage, including small stature, peculiar facial features, and low IQ.

5. In order to determine the extent and impact of Petitioner's brain damage, Petitioner requires the assistance of a forensic psychiatrist. Additionally, and dependent upon my findings, Petitioner may require the assistance of a neuro-psychologist expert in the area of alcohol damage to the fetus.

I declare under the penalty of perjury that the foregoing is true and correct.

Robert S. Brown

Dr. Robert S. Brown, Sr.

Sworn and subscribed to
before me this 11th day
of January, 1995.

Deborah A. Hall

Notary Public

My commission expires: 6/30/98

ljt\tw\brown.aff

Thomas L. Pinckert, M.D., FACMG
Clinical Geneticist

11624 Lake Potomac Drive • Potomac, M.D. 20854 • (301) 299-8378

MEDICAL GENETICS EVALUATION

Terry Williams
DOB: 9/11/55
Date of Evaluation: 6/10/95

Reason For Referral:

Mr. Terry Williams is a 39 year old African American male who is currently incarcerated at Mecklenburg Correction Center having been charged and convicted of capital murder in 1986. Mr. Williams is scheduled to have an evidentiary hearing on June 15 and 16, 1995 in state court in Danville, Virginia. He is represented by Ms. Linda Tarlow, an attorney with the law offices of O'Donoghue & O'Donoghue in Washington, D.C. who has requested that Mr. Williams undergo a medical examination by a clinical geneticist to determine and diagnose:

1. If Mr. Williams has the physical pattern and behavioral characteristics of an individual affected with Fetal Alcohol Syndrome (FAS) and how they might relate to his criminal charges.

2. If Mr. Williams suffers from any other genetic condition that would affect his ability to conform to the law.

Records reviewed:

Youth Services Record
Listing of Immediate Family Records
Public School Records
Correctional Records
Reports of Drs. Centor, Mansheim, and Ryans
Medical Records from Danville Hospital
Central State Psychiatric Hospital Records
Attorney's Notes from Interview with Wife and Daughter of Terry Williams
Post-sentence Investigation Report by R. Ken Potcat
Attorney's Notes from Interview with Probation Supervisor and Parole Officer
Four Affidavits of Dr. Robert S. Brown, Sr.

Affidavit of Williams G. Doss
Affidavit of Bruce Eliott
Affidavit of Debra Grant
Affidavit of Doretha Graves
Affidavit of Martha Hampton
Affidavit of Jimmie Joyce
Affidavit of Dr. Paul A. Mansheim
Affidavit of Richard Ofshe
Affidavit of Dr. Miller M. Ryans
Affidavit of Lois Whittle
Affidavit of Jeanie Williams
Affidavit of Jenny Lee Williams
Affidavit of Laverne Williams
Affidavit of Lula Williams
Affidavit of Noah Williams
Affidavit of Olivia Williams
Affidavit of Orlando Williams
Court Records of Lula Williams

Medical Evaluation:

Examination of Mr. Terry Williams on 6/10/95 at Mecklenburg Correction Center, Boynton Virginia

History

Mr Terry Williams is a 39 year old African American male who was the four pound product of a term pregnancy to his mother, Lula, age 30 and his father, Noah Sr., age 45, being born on 9/11/55 at home with the assistance of a midwife. Ms Williams had 12 pregnancies and 3 miscarriages with Terry being her seventh child. Ms. Williams indicates by affidavit that she had no prenatal care with Terry's pregnancy. During her pregnancy in 1955, she and her husband manufactured bootleg liquor and beer with Ms. Williams being arrested several times for bootlegging during that time. She notes that during her entire pregnancy with Terry, that she drank bootleg liquor beginning on Friday nights and continuing through Tuesday nights. Sometimes she would not drink liquor on Wednesdays and Thursdays. Sometimes she would drink liquor seven days a week. On days that she did drink, she drank heavily straight through from morning until night. She indicates that from 1958 until 1960 that all of her children including Terry were removed from the house and placed in foster care for neglect and allowing the children to drink bootleg liquor. Danville Juvenile

Court reports show that the children were removed on 4/1/57 and returned to the custody of the parents on 4/15/59.

Terry's father, Noah Sr., was a native of Greensboro, N.C. with a birth date in 1910. He attended school through the fifth grade. He was employed as a school custodian and also supported the family through the manufacture of bootleg liquor and beer. He was described by his wife and children as being a violent, abusive man who beat Terry with a belt after tying him to the bed. Terry's sibling indicate in their affidavits that Terry often would stay out all night in an effort to avoid his father's wrath. Noah Sr., died in 1980.

Terry's mother, Lula, also attended school through the fifth grade. Her health was described as not good and she worked in service for other African American families 1-3 days per week. Due to her husband's menial job and her health problems it seems that the family lived below the poverty level most of the time. She supplemented their food with a garden at home.

Terry attended school in reguiar classes until 6th grade then spent 2 years in Special Education. He failed primary period I and II in 1962-64 and was passed on in primary II after the second attempt. He passed grade 4, failed grade 5 and dropped out on his second attempt at grade 5 due to court action. He passed in Special Education in June 1969 and June 1970. He was described at making "very poor progress." School records indicate that he was promoted "because of his age." His grades were consistently poor and his reading ability was 5 years behind at age 13.

Mr. Williams had significant problems with the law as well as with school as he was growing up. His criminal history record reflects 23 charges from 15 incidents from 9/66 to 9/86 not counting the charges for which Mr. Williams is incarcerated. His charges range from juvenile offenses such as larceny of a bicycle, to falsely pulling a fire alarm, to destruction of property when he broke 25 windows. As an adult, Mr. Williams has been charged with breaking and entering, grand larceny, malicious wounding, robbery and capital murder.

His first charge was in 9/66 when he committed larceny of a bike. His records in 11/66 state, "Terry did not seem to understand probation and although he is always a very appealing likable fellow, he never actually responds to any conversation or seems to understand right from wrong to any great degree." In 1967 he was charged with disorderly conduct, throwing rocks through windows with 2 charges of aiding and abetting larceny of a bicycle. He was seen early on as a youth with difficulties making judgments or recognizing normal constraints.

Mr Moody of the State Department of Welfare states on 11/28/67:

> "Terry was seen as an extremely attractive Negro youth who had a very baby face and his stature was so small that he reminded one of a ten year old instead of a thirteen. Worker never saw Terry that he was not smiling as he seemed to enjoy the attention of others. Terry seemed extremely honest in talking about his past behavior and lacked apparent remorse for his actions. In fact, Terry said that his mother had told him to ask for things if he wanted them and if he found that he was not getting them he just decided to take them. He seemed to not have a good understanding of moral judgment and it would seem that possibly he has not been consistently taught the proper guidelines." ..."He is in need of consistent controls and limitations at this point before any other plan could be pursued."

When seen in 12/67 at the Mobile Psychiatric Clinic, Dr. Miller's psychological report found that at age 12-3, 6th grade education, his WRAT, Bender, and House-Tree-Person drawing indicated an IQ of 69, with a reading level of 3.3. He commented that,

> "Although Terry may be intellectually limited, his test results are not entirely consistent with defective intelligence. The possibility of a serious emotional disturbance and/or organicity cannot be ruled out, and retesting is recommended. Although there is no evidence of a visual problem in his folder, it was noticed that when asked to read, Terry held the WRAT only about 3-5 inches from his face. He also complained that he had difficulty reading the numbers on one of the Beta subtests. This problem should be investigated."

Further confirmation of Terry's educational and social problems were given by G. Stanley, Education supervisor at the Hanover School for Boys, Hanover, VA on 8/19/68 when he indicated:

> "Terry Williams' social behavior has shown improvement, while his academic achievement has somewhat regressed. One day he can carry out any assignment, whereas the following day, he may lapse into daydreaming. This puzzling transition from one extreme to the other was evidenced in his California Reading Achievement test score of 1.1, administered 7/68. These results indicated that he put forth no effort and therefore fell far below his potential.
>
> Socially, Terry has a normal peer and adult relationship for a boy of his age. He is somewhat talkative and active, but creates no special disturbances. Terry responds favorably to correction and seldom reacts in a hostile manner.

Our plan for Terry is to continue working with him in our Remedial Program. Special Education is definitely recommended for this youth."

In addition to the physical and verbal abuse that Mr. Williams suffered at the hands of his father, he stated during my examination of him that he was also sexually abused when he was 10 or 12 years old. He alleges that he was assaulted by an older man who picked him up and took him to an office building where he was forced to engage in inappropriate touching. This abuse supposed happened several times but Mr. Williams could not provide more details.

Mr. Williams married Jennie Lee Williams in 1973 and lived in Java, Virginia for 3 years where he and his wife worked in the tobacco fields. In 1975 they had a daughter, Jennie, whom Mr. Williams says has had a granddaughter. Jennie recalls the time with her father fondly and states he frequently gave her money and gifts. He never was violent or abusive according to his daughter. His wife, Jennie Lee indicated that she and Mr. Williams separated in 1976 but have not divorced. She indicated that she and Mr. Williams were still in communication and she would not feel threatened if he were released and lived near them. Mrs. Williams was not called to testify in her husband's capital murder trial though was willing to testify had she been asked.

Mr. Williams medical history is also significant for at least two occasions of severe head trauma. The first occasion occurred when Terry was approximately 10 years old when he fell back on his head. His mother does not think he has acted right since then. She took him to the doctor who said that he did not have a concussion but feels that "he needs a head doctor." He also received head trauma when Terry was hit over the head by his father-in-law. Mr. Williams had several witnesses who stated that he had done nothing to provoke the attack. He required several stitches for his head laceration.

Mr. Williams medical history indicates that he was found to test positive for tuberculosis exposure by a tuberculin skin test in 1967 for which INH chemoprophylaxis was prescribed. He was also noted to have tested positive for syphilis with a positive VDRL and positive fluorescent treponemal antigen. No mention of follow-up to either of these medical problems was found in the medical records.

Mr Williams currently is incarcerated in Mecklenburg Correction Center for being convicted of capital murder in the death of Mr. Stone, a neighbor of Mr. Williams. Mr. Stone was found dead in his bedroom in November 1985 with a blood alcohol level of 0.41 and several bruises on his torso (chest and back). The coroner examined the body and felt that the death was due to natural causes with alcohol as a contributing factor.

Mr. Williams was jailed for stealing a watch in March 1986 and held in the city jail for parole violation. While in the jail serving a 60 day sentence, he began to experience terrifying dreams. He related that he had a dream about the death of his friend, Mr. Stone. In his dream that he related to me during my 6/10/95 examination, he stated that he wished to attend a Michael Jackson concert. He was short of money and stopped by to ask Mr. Stone for two dollars. While there, he learned that Mr. Stone had tickets to the concert but would not let Mr. Williams have them. Terry said that in his dream he went out to Mr. Stone's outhouse and picked up a gardening tool that was like a hoe on one side and a pick on the other, "a mattock." Mr. Stone was very drunk at the time but Terry's dream has him strike Mr. Stone in the chest and on the back. When Terry supposedly touched Mr. Stone there was a great deal of blood that he cupped into his hands and held to his face "like a werewolf". He then picked up Mr. Stone's gold wallet and floated out of the room to the concert. As he was opening the concert door, he awoke from his dream and found himself in jail.

The body of Mr. Stone was exhumed some 8 months after death. Upon autopsy, cracked ribs and fluid in the chest were noted. Mr. Williams was charged with Mr. Stone's death, convicted, and he was given the death penalty for his crimes. Conviction was based in part upon a confession that was supposedly obtained from Mr. Williams, although this record was not provided for review.

Medical examination:

Appearance

The patient is a slightly statured African-American male, dressed in blue denim jeans, light blue work shirt, and white high-top basketball shoes. His hair is braided in rows and his skin color is dark. Skin texture is rough with slight acne. He has a mustache and goatee. He is friendly but slightly shy. He is alert and oriented x 3.

Physical Examination

HT 66" (25%tile) Wt 135 (40%tile)
Arm span 69.5" Lower segment 34"

Head examination - Head circumference 56 cm (75%tile with braids), normocephalic with a scar on the top left of the cranium

Ears - Right ear 6 cm long, Not low set, No posterior rotation, with a prominent antihelix
Left ear 6.25 cm long, Not low set, No posterior rotation, minor prominent antihelix

Eyes - Inner canthal distance 3.7 cm (> 2 SD above mean)
Intra-pupillary distance 6.5 cm (97%)
Outer Canthal distance 9.5 cm (< 1.5 SD below mean)
Rt palpebral fissure 2.7 cm (< 2 SD below mean)
Lt palpebral fissure 2.6 cm (< 2 SD below mean)

Face - There is evidence of prominent mid-facial hypoplasia, left greater than right. This causes the left eye to slant upward and to appear to be located higher on his face than his right eye. The left eye appears to be smaller than the right eye. He has strabismus of the left eye, externally. The right eye is mildly upwardly slanted. He had ptosis of the right lower lid and ptosis of the left upper lid

He has no evidence of complete left hemifacial microsomia as the mandible appears to be symmetrical bilaterally. However, the more prominent maxillary hypoplasia on the left leaves the left side of the mandible slightly more elevated on the left.

The nasal length is 5 cm from root to tip (1 SD < mean) and 4.3 cm wide. The base of the nose is slightly flattened and the nose is not deviated.

The philtrum is 1.5 cm long, very smooth and hypoplastic.

The oropharynx exam reveals a high arched palate with dental malformation and malocclusion. He wears a dental prosthesis for the left central incisor. Teeth are in poor repair with thin enamel.

Neck - within normal limits

Back - Upper thoracic scoliosis is present with rightward deviation. This is estimated at approximately 20 degrees.

Chest - circumference is 80.5 cm; internipple distance is 22 cm, pectus excavatum is present. Cardiac auscultation is within normal limits, heart rate is 72

Abdomen - within normal limits, non palpable liver, spleen or kidneys.

GU - Penis is circumcised, 11 cm long (approx. 25%tile) and 3 cm wide, Testicles are enlarged with the right 5.5 x 3 cm and the left 4.8 x 4 cms (both > 98%tile).

Extremities - Slender upper limbs of normal size, strength and tone.
Patient is right handed. A fine motor tremor is noted when the hands are outstretched. Limited external rotation (supination) is seen in both arms with right > left. Three small scars 1.5-2 cm in length are seen in the right antecubital area.
The legs appear to have normal bulk, strength and tone

Hands -The right hand palm is 11.5 cm, 3rd digit is 8 cm. The left palm is 11.4 cm, 3rd digit is 8.1 cm. Mild clinodactyly is seen on the right hand digits 2,3 & 5. Mild clinodactyly is seen on the left 2nd and 5th digit with more marked clinodactyly on the 3rd digit. Camptodactyly is noted on the 4th digit, left hand. The nails are hyperconvexed and somewhat spoon shaped on all ten digits.

Feet - The right foot is 26.4 cm long, hallux 5 cm, with a 2 cm longitudinal crease on the sole between the 1st and 2nd toes. Marked pes planus is seen bilaterally. The left foot is 27 cm long, hallux 4.7 cm with a 5.5 cm longitudinal crease on the sole between the 1st and 2nd toes. Mild camptodactyly is seen on the left foot digits 2 and 3 with clinodactyly on the 4th. Shoe size is 8.5 by history

Neuro - Deep tendon reflexes intact throughout, however rapid alternating movements were imprecise, hand to nose testing was slow and shaky, gait instability was noted with heel to toe walking. Hopping on one foot showed very poor balance with right showing poorer balance than left.

Psychological evaluation and IQ testing performed by Dr. Robin LaDue

Assessment:

Mr. Terry Williams is an incarcerated 39 year old African American male who was examined to determine if his mother's alcohol intake during her pregnancy left him with the physical patterns and behavioral characteristics of an individual affected with Fetal Alcohol Syndrome.

Fetal alcohol syndrome (FAS) is now recognized as the leading cause of mental retardation in the United States, followed by Down's syndrome and spina bifida. Since it was first reported in 1973 in the US by Jones and colleagues, knowledge about this devastating syndrome has grown rapidly. By 1979 more than 200 articles had been published on FAS. In 1981 the United States Surgeon General recommended that pregnant women or women considering pregnancy abstain from alcoholic beverages. By 1985, 2000 articles on FAS had been published.

Diagnosis of FAS is made from physical examination of the patient, supplemented with information regarding the prenatal exposure to alcohol, the birth record, medical history, and psychological testing to determine IQ and evidence of organic brain damage. A characteristic constellation of findings is necessary in an individual to make the diagnosis of FAS. FAS is diagnosed when: (A) patients had a positive history of maternal alcohol consumption during pregnancy; (B) growth deficiency of prenatal origin below the tenth percentile (height and/or weight) is present; (C) a pattern of specific minor anomalies that lead to a characteristic facies with short palpebral fissures, midface hypoplasia, smooth and/or long philtrum, thin upper lip are visible; and (D) central nervous system manifestations including microcephaly or history of delayed development, hyperactivity, attention deficits, learning disabilities (average IQ 67), intellectual deficits, tremulousness, poor sucking reflexes, abnormal muscle tone or seizures are noted. Patients exposed to alcohol in utero with some of the features of FAS but without evidence of deficiencies in all categories are identified as "possible fetal alcohol effect" (FAE).

A review of the findings in Mr. Williams case are all consistent with a diagnosis of Fetal Alcohol Syndrome (FAS). His mother admits that she drank heavily during her pregnancy with Terry. His birthweight at term was 4 pounds, far below the 3rd percentile. Recorded height and weight have remained consistently low (11/67 - 55" (8%), 68# (<5%); 3/71 - 63" (12%), 110# (8%)). His physical examination on 6/10/95 shows numerous minor anomalies including short palpebral fissures, myopia, strabismus, midfacial hypoplasia, smooth philtrum, ptosis, dental malocclusions, clino/camptodactyly, flexion contractures at the elbows, scoliosis, and an abnormal neurological exam. His medical record is filled with references to slow learning, borderline mental retardation, poor impulse control, lack of comprehension and understanding, and variable abilities to perform tasks from day to day. His formal IQ and psychological testing are consistent with reported IQs from 69 - 78, very simplistic, concrete thinking, and a reading level of approximately the 3rd grade. He was found to have difficulty attending to detail and understanding how consequences follow from actions.

Other typical behavior patterns seen in adults with FAS include lack of appropriate initiative, unresponsiveness to subtle social cues, and lack of reciprocal friendships. In summary, life-long adjustment problems are characteristic of most individuals with FAS and Mr. Williams' behavioral problems are consistent with these finding.

Given the body of literature available in the medical press at the time of Mr. Williams trial for capital murder, his physical stature and abnormal physical findings, plus his recognized learning disability, borderline intelligence, and lengthy history of legal problems secondary to an inability to understand the consequences following his actions, a diagnosis of Fetal Alcohol Syndrome

should have been entertained during Mr. Williams murder trial. His trial counsel was negligent, in my opinion, in not seeking qualified medical experts to assist in the testing and diagnosis of Mr. Williams' medical condition.

While Mr. Williams has classic findings of FAS, his genetic evaluation for other confounding causes of mental retardation and behavior abnormalities would not be complete without recommending that he be tested for Fragile X. Fragile X is the most common cause of *inherited* mental retardation, seen in approximately one in 1200 males and one in 2500 females. Males with Fragile X usually have mental retardation, a long face and prominent ears, and macro-orchadism, with these features being present in more than 80% of patients after puberty. A strong association is noted between the syndrome and autism. The speech pattern is cluttered with stuttering and perseveration on words or phrases. Language delays are common.

The diagnosis and naming of the Fragile X syndrome came in 1969 from the expression of a folate-sensitive fragile site at Xq27.3 induced in cell culture under conditions of folate deprivation. Testing for this syndrome can easily be performed from a peripheral blood sample sent to most genetics labs. Routine cytogenetic analysis are also indicated as constitutional chromosome abnormalities have been identified as frequently or more frequently than fragile X mutations in mentally retarded individuals referred for fragile X testing.

Lastly, several other medical issues should be addressed to complete Mr. Williams genetics evaluation. He should have a CT scan or MRI of his head to confirm findings of FAS that may be present such as microcephaly, abnormal ventricular formation, absence of the corpus callosum, etc., and to more fully evaluate his history of severe head trauma in the past. In addition, he should have testing to rule out the possibility of neuro-syphilis and tuberculosis as these two medical conditions are possible given his medical history. Finally, he should have urine sent for in-born errors of metabolism screening and a plasma aminogram performed to rule out any possibility of aminoacidemia.

Respectfully submitted,

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Clinical Geneticist

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PSYCHOLOGICAL EVALUATION

Terry Williams
DOB: 9-11-55
Date of Evaluation: 6-10-95

Reason For Referral:

Terry Williams is a 39 year old African American separated male who was referred for testing by his attorney, Ms. Linda Tarlow. Mr. Williams has been convicted of capital murder and been sentenced to death. Ms. Tarlow is an attorney working on Mr. William's appeal. Her specific concerns were as follows:

1. The possibility of him having Fetal Alcohol Syndrome (FAS) and the implications of this on Mr. Williams' being sentenced to death;

2. The possibility of Mr. Willams having organic brain damage secondary to FAS and the effect such damage would have on his competency to confess and, therefore, the reliability of his confession;

3. The effect of organic brain damage on Mr. Williams' ability to form the intent to commit the crime for which he was convicted; and

4. Mr. Williams' ability to conform his actions to the requirements of the law.

Diagnosis:

Fetal Alcohol Syndrome, as per Thomas Pinckert, MD, 1995
Rule out Fragile X Syndrome as per Thomas Pinckert, MD, 1995
Rule out Post-traumatic stress disorder

PETITIONER'S EXHIBIT 60

Background Information:

Records Reviewed:

Youth Services Record
Listing of Immediate Family Records
Public School Records
Correctional Records
Reports of Drs. Centor, Mansheim, and Ryans
Medical Records from Danville Hospital
Central State Psychiatric Hospital Records
Attorney's Notes from Interview with Wife and Daughter of Terry Williams
Post-sentence Investigation Report by R. Ken Poteat
Attorney's Notes from Interview with Probation Supervisor and Parole Officer
Four Affidavits of Dr. Robert S. Brown, Sr.
Affidavit of Williams G. Doss
Affidavit of Bruce Elliott
Affidavit of Debra Grant
Affidavit of Doretha Graves
Affidavit of Martha Hampton
Affidavit of Jimmie Joyce
Affidavit of Dr. Paul A. Mansheim
Affidavit of Richard Ofshe
Affidavit of Dr. Miller M. Ryans
Affidavit of Lois Whittle
Affidavit of Jeanie Williams
Affidavit of Jenny Lee Williams
Affidavit of Laverne Williams
Affidavit of Lula Williams
Affidavit Noah Williams
Affidavit of Olivia Williams
Affidavit of Orlando Williams
Court Records of Lula Williams

Mr. Williams is the seventh of twelve children born to Noah, Sr. and Lula Williams. Mr. and Mrs. Williams were described as being "bootleggers" and severe alcoholics. Court records show Mrs. Williams was convicted of bootlegging in 1956. Mrs. Williams acknowledges drinking

heavily during her pregnancy with the defendant. It is reported that, in 1957, Mr. Terry Williams and several of his siblings were removed from the care of there parents due to severe neglect. The children were placed in foster homes for two years while the parents were in jail and after their release. The children were changed from one placement due to their complaints of the foster parents being "mean" and abusive. The second foster home is remembered fondly.

Mr. Noah Williams, the father, died in 1980. He was described as very violent, beating the children severely. This is particularly true in the case of the defendant. There is information available that states Mr. Williams was tied down on the bed and beaten with a belt by his father. There are also reports of emotional abuse by the father.

Mr. Williams, Sr. did work at menial tasks, e.g. a janitor, and both parent worked in a funeral home. Apparently, a major source of their income was from bootlegging. In later years, Mr. Williams, Sr. received an income from disability. However, the family seemed to live below the poverty level most of the time.

The defendant, Terry Williams, attended Special Education classes until the 7th grade. He has frequently been described as having limited and borderline intellectual abilities. He had significant difficulties in reading and arithmetic. A reading score of Grade 3.3 was obtained on the Wide Range Achievement Test (WRAT) when Mr. Williams was 13; he was already five years behind in his reading skills at this point in his life.

He dropped out of school around the age of 13 and later entered the Job Corp. Mr. Williams' grades were C's and D's with him failing several grades. It is not clear why he was passed on to the next level. His comportment was described by his teachers as inconsistent. A few specific comments are very telling:

"One day he can carry out any assignment, whereas, the following day, he may lapse into daydreaming . This puzzling transition from one extreme to the other was

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evidenced in his California Reading Achievement Test Scores..."

"Terry responds favorably to correction and seldom reacts in a hostile manner."

Mr. Williams' work history echoes his academic career. He has had difficulty maintaining any consistent employment. His jobs have been in the tobacco fields and other odd jobs. He seems to get along well with others on the job (see affidavit of Bruce Elliott and Jimmie Joyce) but seems unable to handle any significant amount of responsibility and/or independence in the job environment.

Mr. Williams' social skills were alternately seen as adequate and limited. He was described as having a "poor moral character," "not understanding right from wrong," "lacking in motivation," and having "limited insight and judgment." He did marry at around the age of twenty and is still married even though he and his wife have been separated for many years. There is one child from this union, a daughter who is now around twenty years of age. No specific reason was given for either the separation or the decision to not divorce.

Mr. Williams stated he was sexually abused by an older man when he was about 10 to 12 years of age. He said this man picked him up and took him to "some office building." He did not give many details simply stating "the man touched him and made Mr. Williams touch him." He said this happened several times. He could not give a reason as to why he kept getting into the man's car.

Mr. Williams has had a significant history with legal institutions. He was arrested as a juvenile for stealing a bicycle, falsely pulling a fire alarm, and breaking and entering. He spent time in juvenile institutions. Apparently, he did fairly well in these structured settings, having difficulties, again, when he is out and has to manage his own life.

A probation officer stated in 1966 that "Terry did not seem to understand probation and, although he is always a very

appealing and likable fellow, he never actually responds to any conversation or seems to understand right from wrong to any degree."

Adult offenses have included armed robbery, malicious wounding, and stealing a watch. He was with another person during the armed robbery and, according to his report, his "friend" planned the incident. He is currently on death row, awaiting execution, after a conviction of capital murder. Mr. Williams was charged with the death of a Mr. Stone, a neighbor. According to the information available, Mr. Stone was found early one morning in November, 1985, dead in his home. He apparently had a blood alcohol level of .41, several times the legal limit for intoxication. It was noted that he had bruises on his torso but, apparently, the coroner felt these were old and death was ruled from natural causes.

Mr. Williams stated he learned of the death of Mr. Stone from people in the neighborhood. Several months later, in April, 1986, Mr. Williams was serving a 60 day term for stealing a watch. According to the reports available and information given during the current clinical interview, Mr. Williams claimed to have had a dream regarding the deceased.

In this dream, as recounted to the present evaluator, Mr. Williams wanted to go to a Michael Jackson concert. He needed two dollars which he felt the deceased had. When he got to Mr. Stone's house, he saw Mr. Stone had tickets. Mr. Williams went on to say that, in the dream, he took a tool similar to an ax, and hit Mr. Stone in the chest. He recalls, in the dream, hearing the ribs crack and seeing the chest and stomach split open.

Mr. Williams said the dream continued with him turning the deceased over and hitting him on the back. He then said, in the dream, that he saw Mr. Stone had a glittering gold wallet that he, the defendant, took. He then said he saw himself, in the dream, floating away to the concert. Mr. Williams stated he woke up and was still in jail. His reporting of this dream was fairly consistent with the description available in the background information.

The body of the deceased was exhumed, broken ribs were found, and Mr. Williams was arrested. He was charged with capital murder, convicted, and sentenced to the death penalty. According to reports, Mr. Williams confessed to the crime. The contents of this confession were not provided to current evaluator.

Behavioral Observations:

Mr. Williams presented as a small, well built man dressed in prison clothing. He was gregarious and pleasant although fairly passive during the testing session. He was cooperative although he needed to have the directions to the various subtests repeated throughout the testing.

His speech was interesting. He was often unable to complete sentences and paragraphs without losing his train of thought and being prompted. He integrated information given by the examiner into his conversation in a manner that was unique. An example of this is as follows:

One of the tests administered to Mr. Willams was the scene of several men sleeping in the grass. Mr. Williams' response to this card was "They are tired form working tobacco." He was asked if he had worked tobacco. He said yes, for ten years. The examiner asked if, in fact, it was not only a year, Mr. Williams was quick to agree. It is not actually known how long Mr. Williams did work in the tobacco fields.

He was able to attend, in a fairly reasonable manner, to the tasks assigned to him. However, he had to be told the directions several times over. The more abstract the task and the more complicated the directions, the less able he was to complete it. He showed open frustration on one task, but, with prompting, went back to it.

Mr. Williams seemed honest and open in his responses to questions that were posed. He gave differing answers to the same questions but it seemed more that he could not remember what he had answered before or that he did not fully comprehend what was being asked than an actual

attempt at deception. He seemed to give directly dishonest information when asked about drinking while he was married. He denied such action even when the examiner pointed out that this had been documented in his records. The reason for this "deception" is not known. Certainly, no purpose was served by it. At times, it appeared Mr. Williams was answering as he felt was expected of him, even if his expectation was inaccurate.

Mr. Williams is quite growth deficient in height and head circumference. He has many of the facial and physical characteristics associated with Fetal Alcohol Syndrome. This diagnosis was confirmed by Dr. Thomas Pinckert of Georgetown University Medical School, Department of Genetics.

Tests Administered and Results:

Mr. Williams was administered the Wechsler Adult Intelligence Scale-Revised (WAIS-R); the FIRO-B; the Bender Visual-Motor Gestalt test; the Rorschach Inkblot test; and the Thematic Apperception Test (TAT). He was administered the Minnesota Multiphasic Personality Inventory-A (MMPI-A) by Dr. Robert Brown of Charlottesville, VA. An oral administration was done due to Mr. Williams' poor reading skills.

Mr. Williams' scores on the WAIS-R were as follows: Verbal IQ = 77; Performance IQ = 81; and Full Scale IQ = 78. These scores are in the borderline to low normal range. These scores are consistent with those previously reported. His Performance scores are only slightly higher than his Verbal scores. His short-term memory, abstracting abilities, and comprehension skills are compromised. He has a limited understanding of social rules and expectations.

Mr. Williams has difficulty attending to detail and understanding how consequences follow from actions. His problem solving skills are moderately compromised as is his general understanding of his environment.

Mr. Williams' drawings on the Bender Visual-Motor Gestalt test were immature with minor distortions and slight rotations. Placement was adequate. The distortions were not severe but may be indicative of mild to moderate organic damage.

His scores on the FIRO-B showed him to have a low need for inclusion but to give the impression of being sociable and gregarious. He is emotionally needy but apt to have superficial relationships rather than close friendships. Mr. Williams is more likely to be a "follower" rather than a "leader." He does not want control over others but would like more control over his own life.

Mr. Williams' responses to the TAT items were appropriate although somewhat concrete, superficial, and immature. He related many of the pictures back to his own life, e.g. not wanting to hurt his family, feeling tired from working in the tobacco fields, and wanting out of jail. Most of the people in his stories were loving and kind towards each other. No signs of hostility, aggression, or violence were noted.

These results were echoed in his Rorschach responses. Many of his responses were typical although some showed minor deficiencies in form and content. Again, no signs of aggression or hostility were seen; this is consistent with the information in Dr. Centor's 1986 report. Many of the responses contained human elements, often of cooperation. No overt signs of a thought disorder were noted.

The computer-generated program was thought to be valid although there was a pattern of "carelessness or inattention to content." The possibility of Mr. Williams not fully understanding the meaning of the items also exists. However, the interpretation will be presented.

His MMPI-A profile suggests Mr. Williams behaves in negative, impulsive, and socially unacceptable fashion. He may use alcohol and other drugs and display a variety of somatic complaints. In addition, he is apt to have anxiety, low morale, depressed mood, helpless, and feelings of condemnation. He may feel alienated from the world,

estranged from others, and misunderstood. He reports a preoccupation of feeling guilty and unworthy. In addition, he feels life is no longer worth living.

He is likely to exhibit superficial guilt and remorse and negative self-esteem following episodes of acting out behavior. However, as with many people with FAS, Mr. Williams does not appear to learn from his past mistakes and frequently repeats his problem behavior.

He endorsed a number of extreme and bizarre ideas suggesting the presence of delusions and hallucinations. Mr. Williams has claimed having these before but denied them to the current examiner. There was no overt evidence of a thought disorder on other testing results. He appears hypersensitive and fearful. This may lead to debilitation in social and work settings, particularly without appropriate structure and supervision.

The profile obtained by Mr. Williams is associated with feelings of acute distress when seen among people who are incarcerated. This distress is resultant from their own impulsive behavior. They may not fully participate in treatment. In Mr. Williams' case, however, this is as likely to result from his cognitive deficits as from his personality problems.

Summary and Recommendations:

Mr. Terry Williams is a 39 year old African American who was referred for testing by his attorney, Ms. Linda Tarlow. She was concerned about the possibility of Mr. Williams having Fetal Alcohol Syndrome and implications for his appeal. Mr. Williams is of borderline intelligence but his adaptive functioning appears far more compromised than his IQ would indicate. His abstracting and comprehension abilities are significantly affected as are his ability to plan, connect his action with consequences, and understand social rules and expectations.

Mr. Williams is diagnosed as having Fetal Alcohol Syndrome. The behavioral problems listed above are

consistent with the organic damage and frontal lobe deficits associated with prenatal alcohol exposure. This damage is permanent and severely impacts on an individual's daily, vocational, and academic functioning. Such as been the case with Mr. Williams.

Mr. Williams appears easily suggestible. He could not process complex directions and needed prompting to stay on tasks. He seemed eager to please and quite naive. His social demeanor seemed more consistent with an adolescent than a middle aged man. He gave inaccurate information when it would have been far more to his advantage to respond accurately but, at times, it seemed he had no sense that his information was false.

Mr. Williams was, in addition to his heavy prenatal alcohol exposure, severely beaten and abused by his father as well as being sexually abused. Mr. Williams himself and his wife both described him as having nightmares, often violent in nature. These nightmares are a common symptom of post-traumatic stress disorder (PTSD). It is not known if Mr. Williams has ever been evaluated for PTSD. If not, this should be done.

The following is in response to the questions asked by Ms. Tarlow:

1. The possibility of him having Fetal Alcohol Syndrome (FAS) and the implications of this on Mr. Williams' being sentenced to death:

Mr. Williams does have Fetal Alcohol Syndrome. This syndrome has been described in the literature for the past 22 years. It is well known that organic brain damage is part of the syndrome. Poor impulse control, a lack of comprehension and understanding, chaotic behavior, and an inability to predict the outcome of one's behavior are hall marks of FAS. Given Mr. Williams' family history of alcoholism, his mother's arrest for bootlegging, and the removal of the children from parental care due to neglect plus his lowered cognitive abilities and growth deficiency, Fetal Alcohol Syndrome should have been ruled out or diagnosed at the time of his first trial.

2. The possibility of Mr. Willams having organic brain damage secondary to FAS and the effect such damage would have on his competency to confess and, therefore, the reliability of his confession:

Mr. Williams is suggestible and very easily influenced. During the evaluation, he integrated elements provided by the examiner into his "recall." He was not able to predict the outcome of his behavior and is not likely to understand the implications of a confession. He has a rudimentary understanding of the charges against him and the legal process. He appears eager to please others; this is consistent with his concern over his dream and writing the letter to the sheriff to express these concerns. Mr. Williams appears to have difficulty always distinguishing fact from fantasy. This also makes his self-report subject to question. These problems are seen among patients with FAS at a significant level and are consistent with the frontal lobe damage associated with FAS.

3. The effect of organic brain damage on Mr. Williams' ability to form the intent to commit the crime for which he was convicted:

Intent often implies an understanding of the possible/probable outcomes of one's behavior. It indicates an ability to predict into the future and to have a comprehension of abstract concepts, e.g. cause and effect. Again, as with many people with FAS, Mr. Williams shows major deficits in these areas. His comprehension, abstracting abilities, and capability of understanding complex cause and effect are seriously compromised. He has difficulty connecting all but the most basic actions with their possible outcomes. These problems are, again, associated with frontal lobe damage due to prenatal alcohol exposure.

4. Mr. Williams' ability to conform his actions to the requirements of the law.

Mr. Williams' brain damage, resulting in impulsivity, poor understanding of cause and effect, low comprehension of social rules and abstract concepts, and difficulty in clearly differentiating right from wrong all make it very unlikely that he could willingly conform his actions to the requirements of the law. It is not that he is necessarily intentionally criminally inclined; more likely, it is simply that given the brain damage he has suffered, he will be easily influenced, not capable of understanding cause and effect except at the most basic level, and not be able to function outside of a structured, supervised setting.

Mr. Williams, despite the crime he is convicted of, does not show overt signs of hostility and aggression. He does not always know fact from fiction and appears easily influenced and eager to please. He will do well in structured, supervised settings. Such settings would minimize risk to the community should Mr. Williams' sentence be reduced.

Robin A. LaDue, PhD
Clinical Psychologist

IN THE CIRCUIT COURT OF DANVILLE
COMMONWEALTH OF VIRGINIA

TERRY WILLIAMS,

Petitioner,

v.

CHARLES THOMPSON,
Mecklenburg Correctional Center,

Defendant.

LP 88-81 HABEAS CORPUS

COMMONWEALTH OF VIRGINIA
COUNTY OF MONTGOMERY :ss

AFFIDAVIT OF RAY P. LUPOLD, III

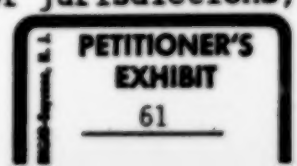
I Ray P. Lupold, III, hereby state and declare under oath as follows:

1. I am a licensed attorney in good standing with the Virginia State Bar and have been practicing law in the Commonwealth of Virginia since 1983. I am presently a partner in the law firm of Marks & Harrison P.C. I have been a partner in this firm since 1988.

2. I received my undergraduate degree from the College of William & Mary in 1979. I graduated in 1983 from the University of Richmond Law School where I received a J.D.

3. I was an Assistant Commonwealth's Attorney in Petersburg, Virginia beginning in 1984. In 1986, I became a multi-jurisdictional drug prosecutor for the jurisdictions of Hopewell, Chesterfield, Prince George and Petersburg until I entered full time private practice.

4. While in private practice I have served as a Special Prosecutor in a number of jurisdictions, including the Counties of



Chesterfield, Dinwiddie, Hanover and Prince George and the Cities of Hopewell and Petersburg.

5. Currently, my private practice has concentrated in criminal law where I spend approximately 75% of my time representing defendants or acting as a Special Prosecutor.

6. Since 1983 I have been responsible for representing the Commonwealth or a defendant in over 100 murder cases. Approximately 15 to 20 of these have been as a prosecutor.

7. Since 1983 I have been responsible for representing the Commonwealth or a defendant in approximately 20-25 capital murder cases. Approximately 5 of these have been as a prosecutor.

8. I have served on the Board of Directors to the Virginia Capital Representation Resources Center since 1994.

9. I have been an active member of the Virginia Bar District committee for four years and have served on numerous other organized bar related boards and committees.

10. I have reviewed several materials in the Terry Williams case including the complete trial transcript, the Amended Petition for habeas relief, and most of the affidavits and exhibits included in the petition and Mr. Williams' school, prison, social services and medical records.

11. Initially, I want to point out that a capital murder case is a unique case and puts a tremendous amount of stress on the defendant's attorney. For one thing, he or she is not just concerned about winning or losing the case but is saddled with the ultimate penalty - a loss of a life. Moreover, the attorney must

oftentimes push every defense to the limit and master not only criminal and constitutional law but also medical, psychiatric and social issues.

12. In addition the attorney must prepare for two trials. The first is the trial over innocence or guilt. However, equally, or in many cases more important, is the sentencing phase of the trial. Thus, the capital murder defense attorney has double the pressure.

13. My review of the records in this case clearly demonstrates inadequate preparation and performance by Petitioners' trial counsel in both the guilt and sentencing phases of this case. In several areas, trial counsel's performance fell below even minimal acceptable standards of competent counsel and prejudiced Petitioner in such a way that it is my opinion that but for these errors, it is more likely than not that the outcome of the trial would have been different. Petitioner's habeas attorneys have requested that I review some specific aspects of the performance of Petitioner's trial counsel and give an opinion as to both the level of competence of counsel and whether their conduct resulted in any prejudice to Petitioner. What follows are my comments and opinions on these specific areas.

14. The first issue I have been asked to comment on is trial counsel's handling of the confession. It seems to me that this is one of the most crucial issues of the entire case because the Commonwealth had no case without the confession. Trial counsel's failure to work with the psychiatric experts appointed by the Court

was a serious mistake. It is my understanding that the testimony at the habeas hearing from trial counsel and the experts themselves confirmed that trial counsel may have talked only briefly with Dr. Centor prior to trial. Thus they spent no time developing a theory that the confession may be false or that Petitioner may not have been able to separate fact from reality due to Fetal Alcohol Syndrome or some other defect. Ake v. Oklahoma provides that a defendant cannot meaningfully participate in a criminal proceeding where his mental condition is at issue without the assistance of a psychiatric expert. The Court makes clear that the expert is to help the defense organize its facts, present its evidence and effectively cross-examine the state's expert witnesses. In the instant case Petitioner's trial counsel squandered this opportunity by treating the experts as neutrals rather than as their experts. This conduct effectively deprived Petitioner of the expert contemplated in Ake and prejudiced him in his ability to have the confession nullified.

15. In addition, once trial counsel knew that the confession was not going to be admitted, it was crucial that they prepare an explanation for the jury. Without it the jury is left with a confession that the defendant does not deny or rebut. To not address the confession with the jury and give the jury a reason to doubt or discount it, in my opinion, was a sign by trial counsel that they were giving up on the guilt phase. There are several ways counsel could have nullified or at least mitigated the confession. First, they could have had the defendant testify that

he was innocent and that the confession was a compilation of his dreams given under stressful conditions. Second, they could have called the psychiatric experts to explain that innocent people often confess to crimes they do not commit. Third, they could have used the psychiatric experts to discuss the effects of Fetal Alcohol Syndrome and the fact that Petitioner may not be able to separate fact from fiction. In my opinion, to leave the confession unrebutted was to ensure a pleading of guilt and this clearly falls below the minimally acceptable standards of a competent attorney.

16. The second area on which I have been asked to comment is the issue of the cause of death. Rarely do you get a case such as this one where there is a real question as to the cause of death. It was imperative that the trial counsel obtain the assistance of an expert pathologist to assist them in presenting their theory on the cause of death and attacking the Commonwealth's theory. My understanding is that trial counsel have stated that they appreciated the importance of attacking the Commonwealth's theory on the cause of death and even thought about the desirability of having their own expert on this subject but that they did not think the Court would approve the appointment of one. It was inexcusable for trial counsel not to secure the services of a pathologist to assist them. In addition to seeking a court-appointed expert, they could have, on their own, sought a pathologist who would assist them for free or at a greatly reduced price.

17. To have entered the trial without the assistance of a pathologist was a crucial error that falls below the minimal

acceptable standards of a competent counsel. Moreover, because the question of cause of death was the best issue with which to raise a doubt in the minds of the jury, the failure to secure an expert pathologist, in my opinion, prejudiced Petitioner. This is made clear by the Affidavit of Kris Sperry M.D. submitted by Petitioner's habeas counsel. Dr. Sperry, an extremely qualified expert pathologist, states that the autopsy indicates that the decedent's injury more likely is more consistent with a fall rather than a blow from a mattock.

18. The failure of trial counsel to investigate or introduce evidence regarding the decedent's heavy drinking and proclivity to fall when he was drunk is also a crucial error. Trial counsel indicated that they knew certain people had seen the decedent with bandages around his chest several weeks or months prior to his death but that he thought it was too remote in time. If they had performed even the minimum amount of investigation required they would have learned that John Whittle, who testified about other matters at the trial as a witness for the Commonwealth, had helped the decedent into his house after he had taken a fall on the day of his death and heard him complain that he hurt his left side. This testimony alone is compelling. When it is combined with Dr. Sperry's affidavit testimony, it makes it more likely than not that this would have raised sufficient doubt in the minds of the jurors with regard to defendant's guilt.

19. Petitioner's habeas counsel have also asked me to give an opinion with regard to the competency of trial counsel in

presenting evidence on mitigation at the sentencing phase of the trial. The paucity of evidence submitted by trial counsel on this subject compared to the significant mitigating evidence uncovered by Petitioner's counsel, in my opinion, highlights the failure of trial counsel to perform at even a minimally competent level in representing Petitioner at the hearing.

20. As stated previously, a capital murder case is unique because it is really two cases in one - guilt and sentencing. From the moment the attorney is assigned the case he or she must start preparing for both phases of the trial. I understand that trial counsel testified at the habeas hearing that he started to prepare for the sentencing phase of the trial a week or two before the trial began. This is clearly inadequate preparation. There is no way an attorney can gather the documentation he needs to acquire and interview prospective witnesses in this short amount of time. Mitigation preparation should begin immediately upon accepting a capital case.

21. Trial counsel's lack of preparation is evident. They called a total of three witness - Petitioner's mother and two neighbors - to testify that Petitioner was a good person whom they did not perceive as a threat. While this testimony is not irrelevant, it hardly does the Petitioner justice. The jury up to the sentencing phase has only seen the defendant as a person who has committed a terrible crime. The prosecutor, if he does his job right, will present further evidence to show defendant as a criminal. It is imperative that the defendant's counsel show the

defendant as a human being. This usually includes a two-prong approach. The first is to demonstrate all the positive aspects of the defendant whether it be from family life, employment, schooling or even previous incarceration as a model prisoner. The second prong is to show the jury the hardships the defendant has had to endure to try to explain why the defendant ended up where he did and to attempt to evoke some sympathy or at least understanding for his predicament.

22. Both these areas were fertile ground for Petitioner's trial counsel. Yet they overlooked or ignored both of them. With regard to the positive aspects of Petitioner's life he had a wife and small daughter who would have described Petitioner as a loving father. According to their affidavits, although they were present at the trial and ready to testify, neither were called. In addition, Bruce Elliott, a certified public accountant and respected member of his community and church, had befriended Petitioner in 1978. Mr. Elliott describes Petitioner as a model prisoner who took pride in his achievements such as graduating from carpentry school. He believed that Petitioner was always striving to better himself despite tremendous odds against him. Although Mr. Elliott introduced himself to Petitioner's trial counsel and offered to do anything he could to help he was never called as a witness. This is inexcusable. The testimony of a respected professional in the community is not only probative, it is often considered a potential "home run" with regards to convincing a jury that a defendant has some worth.

23. There is also an affidavit from James Joyce, Assistant Superintendent of Patrick Henry Correctional Unit in Spencer, Va. He would have testified that Petitioner was a model prisoner while at the facility, meriting the "A custody" list. Indeed Petitioner's incarceration records, which apparently trial counsel never bothered to obtain, show Petitioner as a model prisoner with commendations. He was commended for returning, intact, a wallet that had been lost by a guard on the cell block. He was also commended for turning in a drug ring on his cell block. Mr. Parrish, a prison guard, would have testified to this effect.

24. With regard to the second prong of the mitigation testimony, trial counsel once again failed to obtain readily available information that would have shown Petitioner in a very sympathetic light. I have seen Social Service records which indicate that Petitioner was taken out of his home and placed in foster care with his brothers and sisters when he was only one year old. The police had found the parents and several of the minor children hungry, dirty and drunk. The house was unkempt and there were feces and urine in several places on the floor. The parents were arrested for neglect and the children were placed in foster care for two years. Moreover, the affidavits from family members indicate that Petitioner, as a child, was often tied and beaten by his alcoholic father and that he was so afraid to come home that he would try to stay out all night hiding under buildings or in boxes. There is quite a bit more of this information all going to show Petitioner's difficult childhood.

24. All of this material was readily available to Petitioner's counsel with just a little effort and investigation. I understand that Mr. Motley has said that the Social Service records were not discoverable at that time. He is mistaken. I was prosecuting cases at that time and know of no such prohibition. The failure to obtain this documentation or interview persons, such as Mr. Joyce and Mr. Parrish, falls below even the minimal level of competent legal representation. The failure of trial counsel to call known pertinent witnesses such as Petitioner's siblings, wife, daughter and Bruce Elliott, is inexcusable. In my opinion the prejudice to Petitioner is not hypothetical but real. Without sufficient mitigation evidence presented to the jury, they had no basis to choose life instead of death.

25. Similarly, trial counsel failed to represent Petitioner in a minimally competent manner when they failed to adequately communicate with the psychiatric experts appointed by the Court and failed to object to their testimony on mitigation and future dangerousness. I understand that trial counsel have stated that they primarily spoke to the psychiatric experts at the trial although Mr. Motley may have talked to Dr. Centor before the trial for about twenty minutes. This is totally inadequate. Defendant's counsel must work closely with these types of experts, supplying them with information, preparing their testimony and preparing for cross-examination of other witnesses.

26. In addition, under Virginia law in effect at the time of the original trial, expert psychiatric testimony could not be

introduced by the Commonwealth at the sentencing phase unless the defendant opened the door by introducing this type of evidence. Given the fact that the testimony given by Dr. Centor and Dr. Ryan with regards to mitigation and future dangerousness was extremely prejudicial to Petitioner's case, it was, in my opinion, below the level of minimally acceptable competence for trial counsel to permit such testimony to be given. The prejudicial effect of this error, in my opinion, was devastating. Having heard two experts testify that Petitioner was a future danger and having heard no meaningful evidence of mitigation, the jury was all but invited by trial counsel to vote for the death penalty.

27. Finally, habeas counsel has asked me to comment on the closing arguments by trial counsel in the sentencing phase. The closing argument in the sentencing phase is a crucial opportunity for trial counsel to give the jury a reason to save the defendant's life. In my opinion, trial counsel used their closing arguments to distance themselves from their client and assure the jury that they too thought the crimes Petitioner committed were horrible. Indeed they gave the jury several reasons to vote for the death penalty, including their admonitions that their client showed no mercy when he committed the crime, that there was no reason counsel could fathom as to why the jury should show their client mercy and that their client will keep going back and doing wrong, to name just a few. In my opinion, these closing arguments fell below the acceptable range of reasonably professional assistance. Moreover, in my opinion, it is more likely than not that these closing

arguments influenced the jury to give the death penalty whereas an effective closing argument would have convinced them to opt for life.

28. It is my opinion that the above incidents each fall below the acceptable range of competent assistance as set forth in Strickland v. Washington, 466 U.S. 668 (1984). Moreover, this deficient performance by trial counsel prejudiced Petitioner as it is my opinion that with even a minimum amount of effort or minimum level of competence with regard to any one of the aforementioned errors, the outcome would have been different.

Ray P. Lupold, III

Subscribed and sworn to
before me this 1st day
of September, 1995.

Joanne L. Keeve-Berry
Notary Public
My Commission Expires: 4/30/98

(8)

Supreme Court, U.S.
FILED
JUN 28 1999
OFFICE OF THE CLERK

No. 98-8384

IN THE
Supreme Court of the United States

TERRY WILLIAMS
Petitioner,

v.

JOHN B. TAYLOR, Warden,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

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June 28, 1999

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QUESTIONS PRESENTED

The Court directed the parties to address the following questions:

1. Where both the federal district court judge and state trial court judge who had originally sentenced Petitioner to death concluded that counsel's deficient performance was prejudicial under the test this Court articulated in *Strickland v. Washington*, whether the Fourth Circuit erred in denying relief by reformulating the *Strickland* test so that:
   a. ineffective assistance of counsel claims may be assessed under the "windfall" analysis articulated in *Lockhart v. Fretwell* even where trial counsel's error was no "windfall"; and
   b. the petitioner must show that absent counsel's deficient performance in the penalty phase, all twelve jurors would have voted for life imprisonment, even where state law would have mandated a life sentence if only one juror had voted for life imprisonment.
2. Whether the Fourth Circuit erred in concluding that, under 28 U.S.C. § 2254(d)(1), a state habeas court's decision to deny a federal constitutional claim cannot be "contrary to" clearly established Federal law as determined by the Court unless it is in "square conflict" with a decision of this Court that is "controlling as to law and fact."
3. Whether the Fourth Circuit erred in concluding that, under 28 U.S.C. § 2254(d)(1), a state habeas court's decision to deny a federal constitutional claim cannot involve "an unreasonable application of" clearly established Federal law as determined by the Court unless the state court's decision is predicated on an interpretation or application of relevant precedent that "reasonable jurists would *all* agree is unreasonable."

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OPINIONS BELOW

The Fourth Circuit's opinion is *Williams v. Taylor*, 163 F.3d 860 (4th Cir. 1998) (Joint Appendix ("JA") 489.) The District Court's opinion is *Williams v. Pruett*, CA-97-1527-A (Apr. 7, 1998). (JA 445.) The Virginia Supreme Court opinion is *Williams v. Warden*, 487 S.E.2d 194 (Va. 1997). (JA 430.) The opinion of the Circuit Court of the City of Danville is *Williams v. Netherland*, Case No. LP88-81 (Aug. 15, 1996). (JA 382.)

JURISDICTION

The Court of Appeals' judgment was entered December 18, 1998. A timely rehearing petition was denied January 15, 1999. The petition for certiorari was filed March 5, 1999 and granted April 5, 1999. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case involves the Sixth and Fourteenth Amendments to the United States Constitution, which provide in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Council for his defence," and that "[n]o . . . State [may] deprive any person of life . . . without due process of law." This case also involves 28 U.S.C. § 2254(d)(1), a provision of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States . . . .

STATEMENT OF THE CASE

A. The Trial, Sentence and Direct Appeal

On November 3, 1985, Harris Stone was found dead in his bed with no sign of foul play; the medical examiner concluded that he died of blood alcohol poisoning. *Williams v. Commonwealth*, 360 S.E.2d 361, 363 (Va. 1987). Six months later, Terry Williams confessed he struck Stone with a gardening tool known as a mattock and took three dollars from Stone's wallet. *Id.* After an autopsy of Stone's remains, Williams was indicted for capital murder. *Id.*

Williams was represented at a jury trial by appointed counsel, E.L. Motley, a sole practitioner.[1] Motley served as lead counsel. A recent law school graduate, Robert Smitherman, was appointed to assist him one month before trial. (JA 159-60, 185, 237.)

After a two-day trial, Williams was found guilty of capital murder. (JA 382.) At the penalty phase, the Commonwealth relied on a single aggravating circumstance, future dangerousness, to support a death sentence. It adduced Williams' extensive criminal record and testimony by two mental health experts. (JA 25-108.)

Williams' counsel offered only the testimony of Williams' mother and two neighbors (one plucked from the court audience at the last minute) that Williams was a "nice boy," had never said a "bad word" in their presence, and was not a violent person. Counsel also played the recorded testimony of a psychiatrist who offered no expert opinion but said Williams told him he had removed bullets from a gun so as not to hurt anyone in a 1976 rob-

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[1] Motley received three state bar reprimands (including one the day Williams was sentenced to die) for failing to properly represent clients between 1982 and 1987, and was indefinitely suspended from the practice of law in September 1989. (JA 173-78, 550-62.)

bery and had been unfairly convicted of a crime in 1982. (JA 109-16, 119, 124, 127, 306.)

Counsel then argued to the jury that even if Williams were "worse than Charles Manson," the jury should show him mercy, although counsel could not give "any logic or great earth shattering, moving reason" to do so (JA 133, 137). The jury retired and quickly returned with a death sentence.

The Virginia Supreme Court affirmed the conviction and death sentence, *Williams v. Commonwealth*, 360 S.E.2d 361 (Va. 1987), and certiorari was denied, *Williams v. Virginia*, 484 U.S. 1020 (1988).

B. The State Circuit Court Proceedings

A habeas petition was filed in the Danville City Circuit Court in August 1988. (JA 382.) The court dismissed most of Williams' claims but conducted a hearing in June 1995 on the ineffective assistance of counsel claims. (JA 383-84.) It was undisputed at the hearing that Williams' counsel waited until about a week before trial to begin sentencing preparation and ignored the following mitigating evidence, either because counsel did not think to locate it or wrongly believed the law did not permit access to it. (JA 189-208, 247-49.)

At the hearing, records and testimony were introduced showing that Williams had a traumatic childhood but was able to function well in structured settings and establish positive relationships. He was the sixth of eleven children, and Williams' mother testified that she drank herself into a stupor almost daily while pregnant with him. (JA 319-21, 531-32.) Uncontroverted juvenile records showed that his parents were alcoholics who supplemented their meager income by selling bootleg whiskey. (JA 319-20, 531.) The records described the sordid conditions of Williams' home:

> Lula and Noah [the parents] were sitting on the front porch and were in such a drunken state, it was almost impossible for them to get up. They staggered into the house to where the children were asleep. Terry, age 1, and Noah Jr., age 3, were asleep on the sofa. There was an odor of alcohol on the breath of Noah Jr. . . . Oliver [Olivia] had just awakened and was very sick. She said she was hungry and had been drinking whiskey. Ohair was completely passed out and never could be awakened. He did not have on any clothes . . .
>
> The home was a complete wreck. . . . There were several places on the floor where some one had had a bowel movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash. . . . The children were all dirty and none of them had on under-pants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them. There was stuffed pickle scattered on the floor in the front bedroom.
>
> Noah and Lula were put in jail, each having five charges of neglect placed against them. The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey. When Dr. Harvey examined them, he found that they had all been drinking bootleg whiskey. They were all hungry and very happy to be given milk, even the baby [Terry] drank a pint of milk before stopping. Oliver [Olivia] said they had not had any food all day. Ohair was still so drunk he could not talk.

(JA 528-29.) Williams' parents were jailed for criminal neglect, and the children were placed in a foster home

where they were badly treated before being returned to their parents three years later. (JA 321, 529, 582-93.)

Even then, the "parents show[ed] no interest in . . . the children"; "the children are without food and proper clothes often," and "[t]here are many home problems." (JA 587.) The family was so poor that Williams' mother could not afford surgery to remove a tumor. (JA 531.)

At the habeas hearing, family members testified about the "awful" beatings and emotional abuse suffered by Williams from a father who would strip him naked, tie him to a bed post, and beat him with a belt across his body and face. The parents fought constantly—hard fist fights—that left Williams cowering "in the corner shaking, crying." The child was so terrified of his father that he often stayed away from home all night. (JA 322-34, 577-84.)

Trial counsel never informed the jury that Williams was of borderline intelligence, was placed in special education classes and did not advance beyond the sixth grade. (JA 594-95.) Evidence of Williams' head injuries, referenced fleetingly by his mother at the jury trial (JA 129), was never developed because counsel never looked at a psychologist's report in the juvenile records that mentioned these injuries and "the possibility of a serious emotional disturbance and/or organicity." (JA 208-09, 334-35, 524, 582.)

Counsel admitted that, had they known of Williams' mother's alcoholism, they would have told the court-appointed experts who would have ordered neurological tests for Fetal Alcohol Syndrome ("FAS"), a life-long condition with profound emotional consequences. (JA 197, 231, 286-87, 370-71.) The head of Georgetown University's Medical School Genetics Department in fact diagnosed Williams as having FAS. (JA 353-67.)

It was undisputed at the hearing that Bruce Elliott, a respected accountant, had offered to testify for Williams at trial. He came to know Williams through a prison ministry program, visited him regularly and retained close contact when Williams was out of jail. Elliott would have testified that Williams took pride in completing a carpentry training program and strived to overcome his disadvantaged past. (JA 563-66.)

Williams' wife and daughter were at trial but were not interviewed by counsel. They would have testified to Williams' loving relationship with his young daughter. (JA 207-08, 571-74.)

Correctional records showed that Williams consistently functioned well in a controlled environment. (JA 542-44, 594.) Two correctional officials submitted affidavits to Williams' good conduct while incarcerated, and one stated that his status as an "A custody" inmate meant that Williams was "considered least likely to act in a violent, dangerous, or provocative way." (JA 569, 588.) Williams received two commendations while incarcerated—on January 31, 1985 for his "mature behavior" and "good intentions" in returning a guard's wallet with its money and other contents intact (JA 590), and on November 27, 1984 citing his "concern . . . for others" in reporting information crucial to breaking up a drug ring (JA 601).

Trial counsel's investigation failed to ascertain that the very mental health experts who testified for the Commonwealth would have stated that Williams would not be a future danger in a controlled environment. (JA 232-33, 299-300.) One of these experts, Dr. Arthur Centor of Central State Hospital, was emphatic:

> [I]n a structured environment [Williams] would not be of future danger, he would not be hostile or violent or commit crimes, not likely to commit such acts of violence that he would be a danger to that society in a structured environment.

(JA 313-14.) Centor also described Williams as "quite unique" in this regard. (*Id.*)

Based on the omitted evidence, the same Danville Circuit Court judge who had initially believed a sentence of death "just" and "appropriate" (JA 154) concluded that counsel's unprofessional errors prejudiced Williams and violated his right to effective assistance of counsel. (JA 399-401.) Judge James Ingram found that counsel's failure to investigate, prepare and present mitigation evidence fell "below the range expected to reasonable, professional competent assistance of counsel." (JA 422-24.) "[W]ith so little favorable testimony in the way of mitigation and faced with much unfavorable evidence on the question of future dangerousness, this information could have been critical in the jury's decision as to Williams' punishment." (JA 401.) Judge Ingram accordingly recommended that a new sentencing hearing be granted. (JA 429.)

C. The Virginia Supreme Court

The Virginia Supreme Court rejected this recommendation, concluding that even if Williams' counsel was deficient in failing to present mitigation evidence, that omission was not prejudicial. It recognized "[t]here is no doubt there was such evidence." (JA 439.) But it believed that in the wake of *Lockhart v. Fretwell*, 506 U.S. 364 (1993), it should not resolve Williams' claim based on *Strickland v. Washington*, 466 U.S. 668 (1984)—that, but for the omitted mitigation evidence, there was a reasonable probability he would have received a different sentence—" 'without attention to whether the result was fundamentally unfair or unreliable.' " (JA 438.) Under *Fretwell*, the court reasoned, "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." (JA 438-39.) On this understanding of what *Strickland* meant

after *Fretwell*, the Virginia court held that Williams' death sentence "was not fundamentally unfair or unreliable, and that the prisoner's assertions about the potential effects of the omitted proof do not establish a 'reasonable probability' that the result would have been different, nor any probability sufficient to undermine confidence in the outcome." (JA 441.) It denied all relief. (JA 444.)

D. The Federal District Court

Examining the state record in federal habeas, District Judge James Cacheris granted relief. "[G]iven the amount of mitigating evidence not presented to the jury, the compelling nature of such evidence, and the fact that none of such evidence was cumulative," he found that "there is a reasonable probability that had the jury heard this evidence, at least one juror and perhaps all, would have concluded that the death penalty was not warranted." (JA 473, 487.)

Judge Cacheris found that the Virginia Supreme Court erred in its application of *Strickland* and *Fretwell*. (JA 473.) The determinative inquiry was *Strickland*'s: whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. *Fretwell* applies only when an "outcome determinative" analysis would give the petitioner a "windfall." (JA 474-75.) Because "Williams is entitled, by current law, to have all possible mitigating evidence put before the sentencing jury," he sought no "windfall." (JA 475-76.)

E. The Fourth Circuit Court of Appeals

The Fourth Circuit reversed. It ruled that under 28 U.S.C. § 2254(d), unless a state court decision "is in 'square conflict' with Supreme Court precedent that is controlling as to law and fact"—legally and factually "indistinguishable in any material way" from the Su-

preme Court decision—" 'habeas relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would *all* agree is unreasonable.' " (JA 497-98, quoting *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998) (emphasis added).) Because Williams' facts are not precisely identical to those of *Strickland* and *Fretwell*, the court asked solely whether the Virginia Supreme Court's conclusions were "unreasonable." Assuming "without deciding, that Williams' trial counsel were objectively unreasonable in failing to investigate, prepare, and present [the omitted] evidence in mitigation," the court declined to "say the Virginia Supreme Court's decision that Williams was not prejudiced thereby was an unreasonable application of the tests developed in either *Strickland* or [*Fretwell*]." (JA 501-02.)

The Fourth Circuit believed that *Fretwell*'s "emphasis on reliability and a fair trial simply clarified the meaning of prejudice under *Strickland*." (JA 506-07.) Concurring with the Virginia Supreme Court that the aggravating evidence was "simply overwhelming" and that a "significant portion of the omitted mitigation evidence also painted Williams as a recidivist who was likely to commit future offenses," the court found that "the Virginia Supreme Court's conclusion that there was not 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.' . . . was not unreasonable." (JA 505-06.) It criticized the District Court's conclusion that "there was a reasonable probability that at least one juror would have concluded that the death penalty was not warranted had the evidence in question been presented." Because "[t]he *Strickland* prejudice standard assumes twelve reasonable, conscientious and impartial jurors," a determination "that one hypothetical juror might be swayed by a particular piece of evidence is insufficient to establish prejudice." (JA 504-05.)

SUMMARY OF ARGUMENT

In *Strickland v. Washington*, the Court formulated Sixth Amendment rules to guide courts in resolving a wide range of claims of ineffective assistance of counsel. The prejudice prong of those rules says that a conviction or sentence must be set aside upon the demonstration of a reasonable probability that it would not have been rendered but for the defective performance of trial counsel. Williams' death sentence meets this standard. His lawyers' belated, perfunctory investigation of their client's background not only failed to uncover a wealth of persuasive mitigating evidence but left the state's sentencing case immune from adversary testing.

The appellate courts below were wrong in thinking that *Lockhart v. Fretwell* changes the rules set down in *Strickland* to permit the disallowance of relief in Williams' circumstances as a "windfall." *Fretwell*'s "windfall" principle holds that a claim of ineffective assistance of counsel cannot be founded on the failure of a defense lawyer to use untenable contentions or improper means to secure a victory to which the defendant is not entitled under the applicable rules of law. Neither Virginia law nor constitutional law disentitled Williams to refute the prosecution's case and present a countervailing case based on available, credible factual evidence at his capital sentencing trial. To the contrary, this was the process that every applicable rule of law *required*. The Fourth Circuit was also wrong in faulting the District Court for considering the reasonable likelihood that one juror would have been persuaded to vote against death. Under Virginia law, one juror's vote can preclude a death sentence.

The Court of Appeals erred, finally, in concluding that 28 U.S.C. § 2254(d)(1) required it to leave standing a death sentence based upon a state-court decision which, while contrary to the rules set down in *Strickland*, was not one that *all* reasonable jurists would agree was *un-*

reasonable by those rules. Section 2254(d) distinguishes between cases that are governed by a rule of decision set down by this Court and cases that are not. It instructs a federal habeas court to accept state-court decisions in the latter cases unless the result would be an "unreasonable application" of preexisting constitutional-law principles. But in cases like Williams' where a constitutional rule had been made by this Court to govern the exact issue presented to the state court, a state-court decision "contrary to" that rule in the considered judgment of a federal habeas court is subject to correction under § 2254(d). This is the most straightforward reading of the statute and the one compelled by every canon of statutory construction.

ARGUMENT

In Part I below we show that the clearly enunciated standards of *Strickland are* dispositive of this case. In Part II we show that nothing in *Fretwell* changes this conclusion and that the reasoning by which the appellate courts below denied Williams relief under *Strickland* is untenable. In Part III we show that § 2254(d), as amended by AEDPA, also does not forbid a federal habeas court to give Williams the relief to which he is entitled under the Sixth Amendment rules plainly declared in *Strickland*.

I. COUNSEL'S FAILURE COMPETENTLY TO INVESTIGATE AND PRESENT MITIGATION EVIDENCE PREJUDICED WILLIAMS, DENYING HIM EFFECTIVE ASSISTANCE

A. The Well-Settled Test of *Strickland v. Washington* Defines The Right to Effective Assistance

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court finally resolved the question that had plagued the lower courts since *Gideon v. Wainwright*, 372 U.S. 335 (1963): how to determine when trial counsel's performance constitutes ineffective assistance. Guided by the

purpose of the Sixth Amendment "to ensure a fair trial," the Court articulated a rigorous two-prong test for deciding "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

First, the defendant must show deficient performance falling "below an objective standard of reasonableness." *Id.* at 680. While "[j]udicial scrutiny of counsel's performance must be highly deferential," the "court should keep in mind that counsel's function . . . is to make the adversarial testing process work in the particular case." *Id.* at 689-90. Thus, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691.

Second, because "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding," any "deficiencies in counsel's performance must be prejudicial to the defense." *Id.* at 691-92. Recognizing that "[a]ttorney errors come in an infinite variety" that generally "cannot be classified according to likelihood of causing prejudice," the Court articulated as "the appropriate test for prejudice," whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 693-94. Putting aside "the luck of a lawless decisionmaker" or a lawless decision, "a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Id.* at 695-96.

Under this test, only one conclusion can be reached here: Terry Williams' counsel were grossly deficient and, but for that deficiency, there is a reasonable probability that he would not have been sentenced to die.

B. Application of the *Strickland* Test Requires Invalidation of Williams' Death Sentence

It is clear, and no court reviewing this record has found otherwise, that Williams' lawyers neither undertook a minimally capable investigation nor made informed professional judgments to forego one. Incompetence, not strategy, explains why counsel failed to conduct even a rudimentary investigation that would have revealed available, admissible, compelling mitigation evidence.[2] The record fully supports the conclusions of the two experienced trial judges in the case that counsel's performance was unreasonable under prevailing professional norms. Even the Virginia Supreme Court conceded "[t]here is no doubt there was such [mitigation] evidence; the facts are not in dispute." (JA 439-40.) The only question for the Virginia Supreme Court, and for the Fourth Circuit, was "whether this *deficient* performance constitutes 'prejudice' within the meaning of that term." (JA 440 (emphasis added); *see* JA 501-02.)

Strickland devised its standard for prejudice in resolving the self-same issue that Williams' case presents: the appropriate analysis of "prejudice" to be used to evaluate a claim that trial counsel was ineffective in failing to make an adequate investigation and presentation of mitigation evidence in a capital sentencing trial. Applying this standard, both trial judges who reviewed the powerful mitiga-

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[2] Williams' counsel did not begin to think about the penalty phase, even in general terms, until about one week before trial, and then just "shotgunned" his inquiries. (JA 207, 227.) The absence of a timely, thorough investigation doomed any development of mitigating evidence. Counsel admitted that he did not even seek to obtain the crucial youth and juvenile records because he mistakenly believed that state law barred access to them (JA 194-95), an omission that "betray[ed] a startling ignorance of the law." *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986). Counsel's admission that he would have presented these records to the jury had he been aware of them (JA 195-96) belies any suggestion that his conduct was the product of informed choice or strategy to which deference might be due.

tion evidence described above correctly concluded that there was a reasonable probability that the outcome of the sentencing hearing would have been different but for counsel's unprofessional errors. Any other conclusion blinks reality.

The jury that sentenced Williams to die was completely ignorant of his deeply troubled upbringing; it never knew he was the product of wretched poverty and crippling neglect and abuse. Because of counsel's stunning default with respect to this classic area of mitigation, the jury was deprived of powerful evidence that would have made Williams understandable as a human being and provided a basis for affording him compassion. *See, e.g., Eddings v. Oklahoma,* 455 U.S. 104, 115 (1982).

The unobtained prison records and testimony of prison guards would have documented Williams' nonviolence in a controlled environment and his capacity to "lead a useful life behind bars if sentenced to life imprisonment." *Skipper v. South Carolina,* 476 U.S. 1, 2, 7 (1986). This evidence would also have undermined the contentions of the prosecutor during closing argument that Williams' random, unrealized thoughts, expressed to a detective after Williams' arrest, that he had urges to choke other prisoners established a propensity for violence in prison. (JA 146.) Irrefutable prison records and the testimony of disinterested correctional officers would naturally carry weight with a jury.

The admissions of the Commonwealth's own expert witnesses, on whose testimony the prosecutor relied heavily during closing arguments (JA 146-48), would also have been persuasive in refuting its contention of future dangerousness. Dr. Miller Ryans and Dr. Arthur Centor would have testified that Williams would *not* be a future danger in prison; Dr. Centor concluded that Williams was "quite unique" in this regard. (JA 299-300, 314.) An adequate investigation would have permitted Williams'

counsel to establish out of the mouths of the Commonwealth's chosen mental health experts that Williams was not dangerous in a controlled environment, and—by undercutting the core of the prosecution's case for death—would have given the jury ample reason to reject a death sentence.

The evidence of Williams' partly succesful efforts at self-betterment and ability to establish positive relationships complements his record of responsible life in a custodial environment. Williams' wife and daughter would have shown that he was a loving father. (JA 571-75.) Testimony by accountant Bruce Elliott that Williams worked hard to overcome the handicaps of his congenital and childhood heritage and took pride in graduating from a job training program would have illuminated facets of Williams' character unknown to the jury. (JA 563-66.) Such "testimony from a well-educated professional would have had an impact on the jury on the question of future dangerousness, and could have tilted a juror to favor a life sentence." (JA 400.)

And the evidence that Williams' borderline intelligence could have resulted from head injuries or prenatal alcohol exposure exemplifies the sort of "compassionate or mitigating factors stemming from the diverse frailties of humankind" that jurors find compelling. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

The Virginia Supreme Court belittled this powerful mitigation evidence by characterizing it as showing only that "numerous persons, mostly relatives, thought that defendant was non-violent and could cope very well in a structured environment." (JA 443.) This is a manifestly wrong characterization. Far from centering on people's "thought[s]," the evidence which counsel neglected showed the indisputable *facts* of a troubled upbringing, *specific* intellectual deficits, and documented *behavior* in-

cluding an exemplary *record* of nonviolence in the structured environment of prison. The vast bulk of this neglected evidence was drawn not from "relatives" but from public agency records maintained by public servants who had no incentive to embellish; the Commonwealth's own correctional officers and mental health experts; and Bruce Elliott, a respected professional. The quality of this evidence was not lost on two experienced trial judges, familiar with juries, who found that it would likely have been persuasive against a death sentence.

The Virginia Supreme Court and the Fourth Circuit were equally incorrect in treating Terry Williams' criminal record as comparable to that of the habeas petitioner in *Strickland* so that, on its facts, *Strickland* could be cited as establishing that the series of crimes committed by Williams was "simply overwhelming" evidence of his future dangerousness. (JA 505.) In *Strickland*, the three murders committed in ten days were found to be heinous, atrocious and cruel; they were accompanied by torture and kidnapings and were committed to avoid arrest and to hinder law enforcement. 466 U.S. at 672-74. In contrast to these multiple aggravating factors, the Commonwealth's case for death against Williams was limited to the aggravator of future dangerousness; the prosecution never even contended that Williams' "conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." Va. Code Ann. 19.2-264.4(C). To be sure, Williams had committed crimes of violence on the streets; but the key to the Commonwealth's theory for death was Williams' future dangerousness *in confinement*; and on that issue, the evidence of Williams' prospects was sufficiently "unique" (JA 314) to convince the Commonwealth's own expert witnesses that he was no such danger.

II. THE VIRGINIA SUPREME COURT AND THE FOURTH CIRCUIT EVISCERATED *STRICKLAND'S* PREJUDICE TEST IN DENYING RELIEF

A. The Virginia Court, with the Fourth Circuit's Approval, Erred in Applying *Fretwell* to Diminish Williams' Rights under *Strickland*

Relying on *Lockhart v. Fretwell*, the Virginia Supreme Court rejected Williams' straightforward attempt to satisfy *Strickland*'s prejudice prong by showing exactly what *Strickland* requires: "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The Virginia court reasoned that in light of *Fretwell*, *Strickland* could no longer be read as calling for a determination of prejudice based solely on the reasonable probability of a different *outcome*. (JA 438-39.) Rather, *Fretwell* teaches that "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.' " (*Id.*)

The Fourth Circuit found no cause to disagree with this aspect of the Virginia court's analysis because it concluded that *Fretwell*'s "requirement that a criminal defendant show that the result of the proceeding was unfair or unreliable was the rule, not the exception" in administering *Strickland*'s prejudice standard: "Thus, [*Fretwell*]'s emphasis on reliability and a fair trial simply clarified the meaning of prejudice under *Strickland*." (JA 506-07.) The Fourth Circuit read the *Fretwell* majority as rejecting Justice O'Connor's concurring view that "would limit the prejudice analysis contained in [*Fretwell*] to the 'unusual' case." (JA 506.)

Contrary to these readings of *Fretwell*, that decision neither glossed *Strickland*'s general test for prejudice nor superseded it in the specific circumstances of Terry Wil-

liams' case. *Strickland*'s test—"a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (466 U.S. at 694)—was explicitly designed to apply in a variety of factual settings. And there can be no question that it governs the specific issue raised by Williams' case, because *Strickland* announced the test in just that kind of case: a case concerned with the claim that trial counsel was constitutionally ineffective in failing to make an adequate investigation and presentation of mitigation evidence in a capital sentencing trial. Williams' claim being the very one at issue in *Strickland*, it should be adjudicated by conducting the prejudice analysis *Strickland* dictates. Nothing more is needed, and nothing else is suggested by *Fretwell*.

In *Fretwell*, the issue was whether the failure of Fretwell's lawyer to make an objection which would have been legally sustainable at the time of trial but was no longer so at the time when Fretwell's ineffective-assistance claim reached federal habeas—because the basis for the objection was no longer good law—met *Strickland's* test for prejudice. The *Fretwell* Court concluded that, since the heart of a "prejudice" claim is an allegation that counsel's error did something " 'to deprive the defendant of a fair trial, a trial whose result is reliable' " if "the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him," then "[u]nreliability or unfairness does not result." 506 U.S. at 369-72 (relying on *Nix v. Whiteside*, 475 U.S. 157, 186-187 (1986) (Blackmun, J., concurring) (where petitioner "claim[ed] a right the law simply does not recognize," he was "deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial")). Hence, an outcome-determinative test serves no purpose and would "grant the defendant a windfall to which the law does not entitle him."

Id. at 370.[3] *Nix*, of course, was a case rejecting a defendant's claim that his counsel was ineffective for refusing to present perjured testimony.[4] So Justice O'Connor, harkening back to *Strickland* in her *Fretwell* concurrence, could aptly observe that "the impact of advocating a decidedly incorrect point of law, like the influence of perjured testimony, is not a proper consideration when assessing 'the likelihood of a result more favorable to the defendant.' " *Id.* at 375.

The key, then, to distinguishing the spheres of *Strickland* and of *Fretwell* is to determine whether a lawyer's errors deprived the defendant of a "substantive or procedural right *to which the law entitles him.*" *Id.* at 372 (emphasis added). If it did not—if the asserted ineffectiveness consists only in failing to advance legally unsustainable contentions or resort to legally impermissible tactics—then there is no legally cognizable prejudice, only a "windfall." But if it did, there can be no question of

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[3] In virtually all ineffective-assistance cases, the relief that will follow from a judicial decision that the defendant's Sixth Amendment right to counsel has been violated is a new trial (or a new sentencing proceeding or new appeal), not absolution from reprosecution. In the ordinary *Strickland* situation, this relief is sensible and administrable. Because there is a "reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different," the defendant obtains a new proceeding with a competent lawyer who can do the things that may produce a different outcome. But this makes no sense in a case such as *Fretwell* or *Nix* in which the claimed error was a failure to resort to a "substantive or procedural right" to which the defendant was not entitled. *Fretwell*, 506 U.S. at 372. In those situations, a new proceeding cannot produce a more favorable outcome *unless*, absurdly, the defendant is given the bonus of having his case adjudicated under either false facts (in *Nix*) or false law (in *Fretwell*). This is what inspired *Fretwell's* "windfall" metaphor.

[4] Because the defendant had no lawful right to present perjured testimony, the Court concluded that he had "no valid claim that confidence in the result of his trial ha[d] been diminished" by the jurors' reaching a verdict based on the truth, not the lies he wanted to offer them. 475 U.S. at 175.

a "windfall," and *Strickland*'s outcome-determinative analysis, standing alone, achieves "the proper functioning of the adversarial process" and a "just result." 466 U.S. at 686. With those goals achieved, the inquiry is over.

To require some *additional* showing couched in terms of "fundamental fairness" and "reliability" takes *Strickland*'s clear, albeit demanding, test and adds an additional prong with no readily definable content. There can be no dispute that fundamental fairness and reliability are the *goals* in testing the effectiveness of counsel. But these general goals provide "no workable principle," *id.* at 693, unless they are reduced to an administrable standard. *Strickland* undertook to fashion such a standard with its reasonable-probability-of-a-different-result test. To top this with a second-layer judgment about "fundamental fairness" and "reliability" would convert *Strickland*'s measured formula for prejudice into an impressionistic, value-laden "hunch test" which will be administered inconsistently and can only prove unworkable.

Moreover, the lower appellate courts' insistence that *Fretwell* provides a universally applicable formula for prejudice is at odds with this Court's recognition of a calibrated set of standards for prejudice, fitted to different circumstances. At one end of the spectrum, there are circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," such as the "actual or constructive denial of the assistance of counsel altogether." *United States v. Cronic*, 466 U.S. 648, 692 (1984). At the opposite end are cases like *Fretwell* and *Nix*, where counsel's conduct in failing to resort to claims or maneuvers that are legally foreclosed *cannot*—in fact or in law—prejudice the accused. And in the middle are those cases in which the defendant seeks neither the automatic relief that a *Cronic*-type violation would justify nor the windfall that *Fretwell* and *Nix* decry. For such cases, *Strickland* crafted and

continues to supply as clear and objective a standard as their multifarious nature allows: whether there is a "reasonable probability [of a different] outcome." Each of these approaches is designed to address a different category of prototypical situations; each has been found workable; there is no cause to do what the courts below have done here: blur the Court's plain distinctions and concoct a fungible, all-purpose, all-weather—but, ultimately, meaningless—test.

Beyond the Virginia Supreme Court's incorrect interpretation of *Fretwell* as a gloss on *Strickland*, that court also erred in classifying Williams' case as one in which a "windfall" would result if relief were granted. Such a view of this case reflects either of two indefensible assumptions: that Williams had no right to submit the neglected mitigation evidence to his sentencing jury, or that a life sentence for Williams would be an unacceptable ("windfall") outcome.

As for the first alternative, the District Court observed:

> Williams is entitled, by current law, to have all possible mitigating evidence put before the sentencing jury. . . . [U]nlike [*Fretwell*], . . . introduc[ing] mitigating evidence was a right the law *does* recognize.

(JA 475-76.) Indeed, that right is a "constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). A contrary conclusion by the Virginia Supreme Court would defy the Constitution.

If the Virginia court did not mean to do this, its reference to a "windfall" could only mean that it believed that a jury's favorable consideration of the omitted mitigation evidence would have resulted in a life sentence of which Williams was undeserving. Such a judgment, however, twists *Fretwell*'s conception of a "windfall" beyond recognition. Rather than consisting of a benefit obtained by

a defendant through a procedure to which he has no legal entitlement, a "windfall" would become any sentencing determination with which a court considering a Sixth Amendment claim disagrees. *Fretwell* gives no comfort to that notion. Virginia law entitled Williams to a jury's verdict on the issue of life or death; the Sixth Amendment entitled him to competent representation in trying the issue to a jury; and to grant him both those things—enjoyed by every other capital defendant in Virginia—is no "windfall."

B. The Fourth Circuit Wrongly Faulted the District Court's Reference to the Effects of Counsel's Deficiency upon Any One Juror in Assessing Prejudice under *Strickland*

The Fourth Circuit further distorted *Strickland* by reading it to require—without regard to a State's particular capital sentencing procedure—that a showing of prejudice include a demonstration of the requisite likelihood that all "twelve reasonable, conscientious and impartial jurors" (JA 505) would have voted for a life sentence. Virginia's capital sentencing law provides that "[i]n the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life." Va. Code Ann. § 19.2-264.4(E). Although the Virginia legislature could have constructed its sentencing scheme in some other way, it chose to allow one juror to "hold out" and prevent a sentence of death. Respect for this deliberate choice logically requires a federal court applying *Strickland*'s reasonable-probability standard to consider what might plausibly sway *one* reasonable juror's vote, not all twelve. Thus, the District Court was right in finding prejudice based on its conclusion that "there is a reasonable probability that had the jury heard [the omitted mitigation] evidence at least one juror and perhaps all, would have concluded that the death penalty was not warranted." (JA 473.)

The District Court's analysis is compelling in the death-penalty context where, as here, a State allows one juror's vote against death to spare the defendant's life. In *Adams v. Texas*, 488 U.S. 38 (1980), this Court recognized that individual jurors will perforce bring somewhat different standards for judgment to the penalty decision in a capital trial; capital sentencing is "not an exact science, and the jurors . . . unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths." *Id.* at 46. Such variability from juror to juror was not only accepted in *Adams* but was the bedrock of the Court's holding there. It was also the bedrock assumption underlying the holdings in *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990), that capital sentencing jurors could not be forbidden to consider evidence that they believed *non-unanimously* to be mitigating. This whole body of constitutional law would be senseless if individual jurors were expected or required to be think-alikes. The realistic factual recognition that they are *not* all think-alikes, together with the Virginia legislature's authoritative legal determination that one vote for life requires a life sentence, fully supports Judge Cacheris' finding that Williams suffered cognizable prejudice under *Strickland* because there was a reasonable probability that at least one juror would have been swayed to vote for life by the neglected mitigating evidence.[5]

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[5] The Fourth Circuit faulted this finding because it thought that *Strickland's* observation "that a finding of prejudice does not 'depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency'" made it improper to consider that "one hypothetical juror might be swayed by a particular piece of evidence" which would not sway all twelve. (JA 505.) But Williams' claim is not that he is entitled to the benefit of some one juror's "*unusual* propensities toward . . . leniency." It is that he is entitled to the range of *usual* variation that *Adams*, *Mills*, *McKoy* and common experience recognize to exist among reasonable, conscientious and impartial jurors.

III. SECTION 2254(d) AFFORDS WILLIAMS RELIEF BECAUSE THE VIRGINIA SUPREME COURT DECISION WAS CONTRARY TO AND AN UNREASONABLE APPLICATION OF THE CLEARLY ESTABLISHED FEDERAL LAW OF *STRICKLAND*

The preceding Parts have shown that the Virginia Supreme Court's decision rejecting Williams' Sixth Amendment claim is irreconcilable with the law of *Strickland*. The remaining question is whether 28 U.S.C. § 2254(d) requires a federal habeas court to let such a decision stand. Section 2254(d)—which we examine in detail below—essentially limits habeas relief to cases in which a state court's decision of a federal claim is "contrary to," or involved an "unreasonable application of," this Court's preexisting, clearly established law. The Fourth Circuit below reduced the "contrary to" clause to a cipher (limiting it to the empty category of cases where a state court fails to follow a decision of this Court rendered *on identical facts*) and turned the "unreasonable application" clause into a rubber stamp (restricting review to the question whether *all* reasonable jurists would agree that the state court's decision is unreasonable). Under this construction, an Article III court, exercising statutory jurisdiction to review a federal constitutional decision by a state court, is obliged to give that decision legal effect although it concludes that the decision violated authoritatively established federal law.

Section 2254(d) cannot plausibly be read in such a constitutionally suspect way. As a matter of plain English and the accepted meaning of familiar legal terms, the Virginia court's decision was "contrary to" and involved an "unreasonable application of" the law of *Strickland*. Below we outline AEDPA's modifications of the habeas statute against the background of prior law, document the reading of § 2254(d) that every relevant canon of construction requires, and show how the Fourth Circuit's

contrary reading offends those canons and denies Williams the relief § 2254(d) expressly affords him.

A. AEDPA's Text and Context Reveal that Congress Intended § 2254(d) to Perfect the Court's Approach to Habeas Reform in *Teague v. Lane*

1. *AEDPA's Habeas Amendments*

AEDPA does not alter the jurisdictional requirement that "a district court shall entertain an application for a writ of habeas corpus . . . on the ground that [a state prisoner] is in custody in violation of the Constitution," 28 U.S.C. § 2254(a), but only the procedure for discharging that duty. *See Felker v. Turpin*, 518 U.S. 651, 658-62 (1996). Nor, as this Court has made plain, does AEDPA curtail the writ at every turn.[6] Instead, it gives prisoners one full chance to "receive an adjudication of [their] claim[s]," and—to avoid the "far-reaching and seemingly perverse" result of frustrating this—it builds on preexisting habeas doctrine. *Stewart*, 118 S.Ct. at 1622.

AEDPA does greatly *speed up* and *pare down* the habeas process. Habeas formely "provide[d] a remedy . . . without limit of time." *United States v. Smith*, 331 U.S. 469, 475 (1947). AEDPA puts a one-year limit on filing habeas petitions and for qualifying capital cases cuts the period in half and sets strict deadlines for court rulings. 28 U.S.C. §§ 2244(d), 2263, 2266. Until 1996, a ruling on habeas "was not res judicata." *Sanders v. United States*, 373 U.S. 1, 7 (1963). AEDPA bans relitigation of all claims previously denied on habeas, and adopts a "modified res judicata" rule barring new claims in a successive petition unless they are newly discovered *and* backed by clear and convincing evidence that the prisoner would have been found innocent but for the vio-

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[6] *See Hohn v. United States*, 118 S.Ct. 1969, 1777-78 (1998); *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618, 1621-22 (1998); *Lindh v. Murphy*, 521 U.S. 320 (1997); *Felker*, 518 U.S. at 658-62.

lation. § 2244(b); *Felker*, 518 U.S. at 657. Federal evidentiary hearings used to be available if a prisoner showed *either* "cause and prejudice" for not obtaining a state hearing *or* probable innocence. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 12 (1992). AEDPA forbids hearings unless a prisoner proves *both* cause (narrowly defined) *and* a *clear and convincing* case of innocence. § 2254(e)(2). Habeas appeals used to be available for *all* claims in a petition if any *one* claim was colorable. *Barefoot v. Estelle*, 463 U.S. 880, 893-94 (1983). AEDPA bars appeals absent "a substantial showing of the denial of a constitutional right" on each "*specific* issue." § 2253(b) (emphasis added).

AEDPA also amends § 2254(d), to provide that habeas

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

These terms undoubtedly alter prior habeas practice. In identifying the specific changes they make, the "task" is "to construe the statute that Congress has enacted," *Wright v. West*, 505 U.S. 277, 295 n.4 (1992), "giving the 'words used' their 'ordinary meaning,'" *Moskal v. United States*, 498 U.S. 103, 108 (1990), recognizing that "the law uses familiar legal expressions in their familiar legal sense," *Henry v. United States*, 251 U.S. 393, 395 (1920), and declining to read the act to "work[] a change in the underlying substantive law 'unless an intent to make such [a] chang[e] is clearly expressed,'" *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993). Reading § 2254(d) this way (as we do below) leads to these conclusions:

Section 2254(d)(1) divides state-court "decisions" into two categories defined by the decisions' relationship to "clearly established Federal law, as determined by the Supreme Court." It then prescribes a mode of review for each category. In the *first* category are decisions on claims for which there was "clearly established [Supreme Court] law" when the state court acted, to which its decision could be "contrary"—*i.e.*, claims as to which the Court had prescribed a rule designed for the specific purpose of evaluating that claim. When there was "clearly established Supreme Court law" binding the state court at the time it acted, a federal habeas court asks whether the state "decision was contrary to [that] law." "Contrary to law" review is a familiar legal term for plenary review of another court's legal and "mixed legal and factual decisions" under the prevailing rules of law.

In the *second* category are decisions on claims for which Supreme Court law had *not* designed a rule when the state court acted—claims as to which the law so far laid down by the Court did not control the claim but provided only "givens" from which an applicable rule had to be derived. When the state court was thus required to apply relevant but noncontrolling Supreme Court law and derive its own rule, § 2254(d) tells a federal court to ask whether the state "decision . . . involved an unreasonable application of [that] law." "Unreasonable application" is a legal term taken directly from the Court's *Teague v. Lane*, 489 U.S. 288 (1989) cases, describing a standard of objective reasonableness that is used to review a rule derived by a state court in the absence of a governing federal rule. Indeed, as we show below, § 2254(d)'s plain words and familiar legal terms are deftly designed, as a whole, to perfect and codify the *Teague* rule. We next survey that rule and other law forming § 2254(d)'s backdrop.

2. *The Underlying Substantive Law*

Before 1996, habeas law was stranded between two views of the writ, one giving no shrift to state decisions and licensing federal judges to overturn state convictions based on law created after they were final, another making the state decision dispositive unless proved erroneous and forbidding federal courts to blind-side state judges with new rules of federal law. Regarding the credit due state decisions, pre-AEDPA law regarded federal habeas as "an original civil proceeding, independent of the normal channels of review." *Townsend v. Sain*, 372 U.S. 293, 311-12 (1963). This allowed "relitigation" of prisoners' claims *from scratch*, and obliged federal courts to treat the state decision as merely "the conclusion of a court of last resort of another jurisdiction." *Brown v. Allen*, 344 U.S. 443, 458 (1953). Though this approach survived until 1996 as to state courts' *legal* and *mixed* decisions of federal law,[7] cases like *Sumner v. Mata*, 446 U.S. 539 (1981), *Keeney*, *supra*, and *Coleman v. Thompson*, 501 U.S. 722 (1991), rejected it as to state-court factfindings, hearings and state-law grounds of decision, which were treated as dispositive unless shown to be flawed.

As for the choice of law on habeas, until 1989, habeas courts routinely released prisoners on legal grounds developed after the state courts had upheld their convictions.[8] *Teague* partly curbed this practice, on the core principle that " 'the threat of habeas serves as a necessary additional incentive for [state] courts throughout the land to conduct their proceedings in a manner consistent with

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[7] *See Wright*, 505 U.S. at 295 ("reconsidered de novo"); *Stone v. Powell*, 428 U.S. 465, 477 (1976) ("full reconsideration").

[8] *See Engle v. Isaac*, 456 U.S. 107, 128 n.33 (1982) ("State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during [habeas], new constitutional commands.").

established constitutional standards,' " so that habeas courts " 'need only apply the constitutional standards that prevailed at the time the original proceedings took place.' " *Id.* at 306-07. Under *Teague*, if a prisoner's claim invoked a rule of law that the federal courts had designed for that kind of claim before the state courts ruled, a federal court independently reviewed the claim under that law. *See* note 9 *infra*. But if a claim depended on a rule that had *not* been prescribed for that claim when the state courts acted, it could not prevail unless, " '[s]urveying the legal landscape as it then existed,' . . . a state court considering [the] claim . . . 'would have felt compelled by existing precedent to conclude that the rule . . . was required by' " existing law. *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994).

Most rules in the latter category were not wholly new, but existing rules the prisoner wanted "applied in a *novel* setting"—one for which the rule was *not* originally designed. *Stringer v. Black*, 503 U.S. 222, 228 (1992). Here, *Teague* barred relief unless the state court acted "unreasonably" in rejecting the rule because "application of [the] old rule in [the new] manner" was "dictated by precedent." *Id.* at 236-37. "Whether the prisoner [sought] the application of an old rule in a novel setting" depended not on whether the rule's application raised a mixed question of law and fact but on whether the rule was specifically designed to resolve the relevant claim:

> *Teague* [only] bear[s] on applications of law to fact which result in the announcement of a new rule. . . . If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. . . . Where the beginning point is a rule of this general application, *a rule designed for the specific purpose of evaluating a myriad of factual contexts*, it will be the infrequent

> case that yields a result so novel that it forges a new rule, one not dictated by precedent.

Wright, 505 U.S. at 308-09 (Kennedy, J., concurring) (emphasis added); *see id.* at 304-05 (O'Connor, J., concurring) ("independent evaluation" is required "[i]f a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies"). *Teague* thus was tailored to "refuse[] to give state prisoners the retroactive benefit of new rules . . . [while] not creat[ing] any deferential standard of review with regard to old rules." *Id.* at 303-04.[9]

In three major ways, however, *Teague* fell short of its goal—"that a State . . . not be penalized for relying on 'the constitutional standards that prevailed' " when the state court ruled. *Fretwell*, 506 U.S. at 372. Federal courts continued to nullify state decisions under law that was not in effect or binding when the state court ruled, if the new rule: (1) was created after the state court

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[9] Holding under *Teague* that applying settled mixed-question rules to new facts "is not the stuff of which new law is made," *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 763 (1995) (Kennedy, J. concurring), are *Strickler v. Greene*, 119 S.Ct. ——, 1999 WL 392982, at *13 n.35 (1999) (because Court merely applies *Brady* suppression-of-material-evidence rule to specific facts, but "does not modify *Brady*, we reject [the] contention that we announce a 'new rule' today"); *Bousley v. United States*, 118 S.Ct. 1604, 1609-10 (1998) (*Teague* does not apply, as "claim made here is that petitioner's guilty plea was not knowing and intelligent" and "[t]here is surely nothing new about this principle, enumerated as long ago as [1941]"); *Wright*, 505 U.S. at 294 (no *Teague* bar "because West sought . . . relief under *Jackson v. Virginia*, which was decided . . . before his conviction became final"); *Stringer*, 503 U.S. at 228-29; *Penry v. Lynaugh*, 492 U.S. 302, 314-15 (1989). Post-*Teague* habeas cases conducting de novo review of settled mixed-questions with no hint of a *Teague* problem are, *e.g.*, *Buchanan v. Angelone*, 118 S.Ct. 757, 762-63 (1998) ("reasonable likelihood" that jurors misunderstood an instruction); *Thompson v. Keohane*, 516 U.S. 99, 106-07 (1995) (suspect was "in custody"); *Kyles v. Whitley*, 514 U.S. 419, 441-42 (1995); *Schiro v. Farley*, 510 U.S. 222, 232 (1994).

acted but before *certiorari* review was completed;[10] (2) was adopted by a federal circuit court, whose decisions, unlike this Court's, are not thought to bind state courts;[11] or (3) was within one of *Teague*'s exceptions.[12]

3. *Section 2254(d)'s Rationalization of Habeas Law*

In barring relief unless the state court's "decision was contrary to, or an unreasonable application of, clearly established [Supreme Court] law," § 2254(d) clearly expresses four major changes in the underlying substantive law. The first completes the transformation of the state decision from background prop to the center of habeas attention; the last three finish *Teague*'s work of assuring fidelity to supreme federal law without " 'endu[ing state] jurists with prescience.' " *Lambrix v. Singletary*, 520 U.S. 518, 536 n.5 (1997) (quoting *Stringer*, 503 U.S. at 244 (Souter, J., dissenting)).

First, by making the state "decision" the focus of federal review and dispositive unless erroneous,[13] § 2254(d)

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[10] *See, e.g., Leichman v. Secretary*, 939 F.2d 315, 317 & n.3 (5th Cir. 1991) (petitioner given benefit of *Taylor* rule announced 14 months after direct review, while case was on certiorari); *Rogers v. Lee*, 922 F.2d 836 (4th Cir. 1991) (petitioner given benefit of *Batson* rule announced while his case was on certiorari); *Wilkins v. Bowersox*, 933 F.Supp. 1496, 1526 (W.D. Mo. 1996) (finality on denial of certiorari 22 month after direct appeal).

[11] *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997); Liebman & Hertz, Federal Habeas Corpus Practice and Procedure § 30.2c n.29 (3d ed. 1998) (collecting pre-AEDPA decisions relying on established circuit rules, in absence of governing Supreme Court precedent, to overcome *Teague* bar).

[12] *See* Liebman & Hertz, *supra* note 11, § 25.7 nn.11-12, 26 (collecting decisions granting relief under *Teague* exceptions).

[13] *See Matteo v. Superintendent*, 171 F.3d 877, 885 (3d Cir. 1999) (*en banc*) (§ 2254(d) "firmly establishes the state court decision as the starting point in habeas review"). It is *only* this kind of "deference"—ending relitigation from scratch and giving disposi-

ends relitigation from scratch and the treatment of state decisions as "mere authority." *Second*, by asking whether the state "*decision was*" improper under "clearly established . . . law," § 2254(d) protects state judges whose decisions "were perfectly free from error when made" (*Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring)) from being surprised by law announced during the *certiorari* period. *See Neelley v. Nagle*, 138 F.3d 917, 923 n.3 (11th Cir. 1998). *Third*, by limiting the choice of law on habeas to rules "determined by the Supreme Court," § 2254(d) shields state decisions from nullification by federal circuit precedent in existence, but not binding state judges, when they ruled. *See Sweeney v. Parke*, 113 F.3d 716, 718 (7th Cir. 1997). *Finally*, § 2254(d) has no exceptions. *See Green*, 143 F.3d at 873.

These effects are important. But far from abjuring the Court's habeas reforms, they *perfect* them by more completely locating the state decision at the core of habeas review and realizing *Teague*'s aim of deterring deviations from federal law without commanding clairvoyance about its evolution. This explains why the statute otherwise *codifies Teague* as the Court devised it—as a strict choice-of-law prescription that limits the *rule* to be "appli[ed]" to "clearly established . . . law" in effect when the state "decision" was made but does not impose a new and def-

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tive effect to state court "decisions" *if* they pass muster under the "contrary to" and "unreasonable application" clauses—to which the legislative history refers. *See* H. Conf. Rep. 104-518, 142 Cong. Rec. 3333 (Apr. 15, 1996) (§ 2254(d) "requires deference to the determination of state courts *that are neither* 'contrary to' nor an 'unreasonable application of' clearly established federal law."); 142 Cong. Rec. S3447 (Apr. 17, 1996) (Sen. Hatch) ("[t]he deference . . . just means that we defer to the state courts *if* they have *properly* applied Federal law"; federal courts only cede "the ability to *virtually retry* cases that have been *properly adjudicated* by our State courts") (emphasis added).

erential standard of review of the *result* the state court reached under established law.[14]

B. Properly Read, § 2254(d) Allows Plenary Review of State Decisions That Fail to Follow a Rule of Decision Previously Laid Down by this Court for the Very Issue the State Court Decided

The plain and familiar legal meanings of § 2254(d)'s key phrases, "decision was contrary to . . . law," "clearly established Federal law," and "decision . . . involved an unreasonable application of . . . law," transparently codify the basic *Teague* regime:

"Decision was contrary to law." Under § 2254(d), what is reviewed to see if it "was contrary to law" is the "*decision*." In legal terms, a "decision" is a "conclusion of law upon facts," a "determination arrived at after consideration of the facts and . . . law." In lay terms, it is a "final and definite result of examining a question; a con-

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[14] Section 2254(d)'s supporters assumed that it "codifies and strengthens the deference standard adopted in *Teague*" by "impos[ing the] additional limitation that only decisions by this Court can satisfy the 'clearly established' rule," Brief for Sen. Orrin G. Hatch et al. as Amicus Curiae in *Felker v. Turpin*, 1996 WL 277110, at *24-25 (May 17, 1996), while *preserving* plenary review under settled law. See 142 Cong. Rec. S3446-47 (Apr. 17, 1996) (Sen. Hatch) (§ 2254(d) "essentially gives the Federal courts authority to review, *de novo*, whether the State court decided the claim *in contravention of Federal law*"); 141 Cong. Rec. S7846 (June 7, 1995) (Sen. Hatch) (describing as "absolutely false" Sen. Biden's claim that § 2254(d) requires "defer[ence] to State courts in almost all cases, even if the State is wrong about" established federal law); 142 Cong. Rec. H3602 (Apr. 18, 1996) (Rep. Hyde) ("the Federal judge *always* reviews the State court decision to see if it is *in conformity with established Supreme Court precedents*"). Noting that § 2254(d) "closely emulate[s] *Teague*" without "purport[ing] to limit the federal courts' independent . . . authority with respect to federal questions" are *O'Brien v. Dubois*, 145 F.3d 16, 23 (1st Cir. 1998); *Fern v. Gramley*, 99 F.3d 255, 259-60 (7th Cir. 1996); *see Matteo*, 171 F.3d at 890 (Stapleton, J., concurring); *Neeley*, 138 F.3d at 922; *Zuern v. Tate*, 938 F. Supp. 468, 475 (S.D. Ohio 1996).

clusion" or "resolution."[15] The statute could not be clearer, therefore, that "contrary to law" review applies to mixed-question determinations and bottom-line results.

Nor could it be clearer that review under § 2254(d)'s "decision contrary to law" clause is plenary. "Contrary to" means "in conflict," "inconsistent" or "not in conformity with"; "tending to an opposing course."[16] "Contrary *to law*" means "illegal"; "in violation of . . . legal regulations at a given time." Black's Law Dictionary, at 328. When applied to one court's review of another, "contrary to law" is the legal term of art for plenary review, which courts use to *distinguish* deferential (*e.g.*, "clearly erroneous") review, and which they apply not only to "pure" but also to "mixed" legal questions that "clari[f]y . . . legal doctrine."[17] This reading is compelled in any event by

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[15] Black's Law Dictionary 407, 842 (6th ed. 1990); 4 Oxford English Dictonary 332 (2d ed. 1989); Random House Webster's College Dictionary 344 (1999).

[16] Merriam-Webster Collegiate Dictionary 352 (10th ed. 1993); Webster's New University Unabridged Dictionary 397 (1979); Webster's Ninth New Collegiate Dictionary 285 (1983); Webster's Third New Internat'l Dictionary, Unabridged 495 (1986).

[17] *Salve Regina College v. Russell*, 499 U.S. 225, 232-33 (1991). Under Fed. R. Civ. P. 52(a) and Fed. R. Bank. P. 8013, courts use "contrary to law" to describe their "plenary" review of all judicial determinations other than findings of historical fact reviewed under the "clearly erroneous" standard. *See Flint Elec. Membership Corp. v. Whitworth*, 68 F.3d 1309, 1312 (11th Cir. 1995); *Polyplastics v. Transconex, Inc*, 827 F.2d 859, 860 (1st Cir. 1987); *Palmer v. Shultz*, 815 F.2d 84, 89, 112-13 (D.C. Cir. 1987); *Fairchild v. Lehman*, 814 F.2d 1555, 1557 (Fed. Cir. 1987); *In re Brown*, 743 F.2d 664, 666 (9th Cir. 1984). The Magistrates Act and Civil Rule 72(a) likewise distinguish between an "order [that] is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a). "[R]eview under the 'contrary to law' standard is 'plenary,'" requiring "independent judgment" on all legal questions. *Gandee v. Glaser*, 785 F. Supp. 684, 686 (S.D. Ohio 1992), *aff'd*, 19 F.3d 1432 (6th Cir. 1994); *see Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993); *Haines v. Liggett Group*, 975 F.2d 81, 91 (3d Cir. 1992), In all four areas, mixed questions elaborating

the settled meaning of the word "law" in the phrase "contrary to law." *See Thompson v. Keohane*, 516 U.S. 99, 111-12 (1995) ("mixed questions of law and fact" are "ranked as issue of law"); *Kansas City S. Ry. v. C.J. Albers Comm'n Co.*, 223 U.S. 573, 591 (1912) (a "mixed question" is "a finding upon questions of fact [that] is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter").

The common sense of the phrase "decision was contrary to clearly established Federal law" yields the same conclusion. For it is when there was "clearly established law" in effect at the time the state court acted—when there was a rule in effect designed for the specific purpose of resolving the relevant claim—that the state court's decision can be tested against that law and said to be "contrary to" law or, conversely, conformable to law. *See O'Brien*, 145 F.3d at 24-25 ("If no Supreme Court precedent is dispositive of a [claim], there is no specific rule to which the state court's decision can be 'contrary.' "). That, indeed, is the precise sense of the identical phrases the *Teague* cases use to describe their "de novo review of *mixed* questions" that arise in deciding whether state decisions were "*contrary to*" (*Butler v. McKellar*, 494 U.S. 407, 414 (1990)) or "*contravene well-considered precedents*," or, conversely, whether they "*conformed to rules then existing*," *Wright*, 505 U.S. at 307 (Kennedy, J., concurring); *Saffle v. Parks*, 494 U.S. 484, 486 (1990); "*comply with the federal law in existence* at the time," or "*comport with the federal law* [*then*] *established*," *Sawyer v. Smith*, 497 U.S. 227, 234, 239 (1990); were " '*consistent with established constitutional standards*' " or

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legal meaning receive "plenary" review. *See, e.g., Salve Regina College*, 499 U.S. at 232-33; *Pullman-Standard v. Swint*, 456 U.S. 273, 289 & n.19 (1982); *ATACS Corp. v. Trans World Commun.*, 155 F.3d 659, 665 (3d Cir. 1998); *Loehrer v. McDonnell Douglas Corp.*, 98 F.3d 1056, 1061 (8th Cir. 1996).

" 'rest[] upon *correct application of the law in effect* at the time,' " *Teague*, 489 U.S. at 306-07 (emphasis added).

"Clearly established Federal law." The clincher is the "established . . . law" phrase itself, which the *Teague* cases use to mean the "old rules" under which habeas review of pure *and mixed* questions is plenary. *See, e.g., Gray v. Netherland*, 518 U.S. 152, 167-69 (1996) (plenary review only under "a *well-established rule*" or "*well established* right"); *Stringer*, 503 U.S. at 231 (plenary review under a "*well-established requirement*") (emphasis added).[18] Language " 'transplanted from another legal source . . . brings the old soil with it,' " obliging courts to give the adopted phrase "its clearly accepted meaning." *Evans v. United States*, 504 U.S. 255, 260 & n.3 (1992); *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 98 (1991). The accepted meaning of the "old rule"—the "clearly established law"—as to which *Teague* "g[a]ve prisoners the retroactive benefit . . . but did not create any deferential standard of review" (*Wright*, 505 U.S. at 304 (O'Connor, J., concurring)), serves in § 2254(d) to define the old or established rule to which a state decision *can be* "contrary." This refers to a preexisting rule *designed for the specific purpose of evaluating the relevant claim*, including "a rule of . . . general application . . . designed for the specific purpose of evaluating a myriad of factual contexts." *Id.* at 309 (Kennedy, J., concurring). *See id.* at 304 (O'Connor, J., concurring).

"Decision involved an unreasonable application of law." What review is required, though, when at the time the

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[18] *See also Goeke v. Branch*, 514 U.S. 115, 118 (1995); *Wright*, 505 U.S. at 304 (O'Connor, J., concurring); *Sawyer*, 497 U.S. at 239; *Penry*, 492 U.S. at 314. Many pre-AEDPA lower court cases use "clearly establish" to describe rules that are "old" for *Teague* purposes, triggering plenary review. *See, e.g., Dawson v. United States*, 77 F.3d 180, 183-84 (7th Cir. 1996); *Walter v. United States*, 969 F.2d 814, 818 (9th Cir. 1992).

state court acted, there was *no* rule for resolving the claim to which its "decision" could be "contrary?" What if the "propositions [then] established were [only] the 'givens' from which any [rule] had to be derived, [but] . . . were not 'controlling authority' in the sense" that "a state court considering [the prisoner's] claim at the time his conviction became final would have felt compelled . . . to conclude that the rule [he] seeks was required by the Constitution?" *Lambrix*, 520 U.S. at 527, 529 n.3. Again, § 2254(d)'s answer is *Teague*'s: The habeas court must ask whether the state "decision involved an unreasonable application of clearly established law."

Notably, the diction here switches from asking what "the decision *was*" to what it "*involved*," *i.e.*, to what it "contain[ed] as a part" or "feature," or "include[d] in its operation." [19] Plainly denoted is a switch from review of the state-court decision itself—the application of law to fact to reach a result, *see* pp. 33-34 *supra*—to review of only a part or feature of the decision.

As plainly, the feature to be reviewed is the "unreasonable[ness]" *vel non* of the decision's "application of clearly established Federal law." *And that feature—a decision's reasonable or unreasonable application of law—is in terms the one that, in the same situation, drives the outcome under* Teague. Thus, if no governing rule was available when the state court acted, because "established" law at the time merely provided " 'givens' " from which a rule "had to be derived," *Teague* required habeas courts to ask whether the rule the state court derived "from precedent *is not reasonable*," *Wright*, 505 U.S. at 304 (O'Connor, J., concurring), or was an "*unreasonable application of these principles*," *Gilmore v. Taylor*, 508 U.S. 333, 351 (1993) (O'Connor, J., concurring), or an "*illogical or . . . grudging application of*" precedent, *Wright*, 505

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[19] The American Heritage Dictionary 950 (3d ed. 1992); Oxford American Dictionary 349 (1980).

U.S. at 312 (Souter, J., concurring)—or, conversely, whether the rule involved in the state decision was a "*reasonable application*[] *of then-existing law*," *Thompson*, 516 U.S. at 119 n.1 (Thomas, J., dissenting), a "*reasonable reading*" of that law, *Stringer*, 503 U.S. at 247 (Souter, J., dissenting), or "a *reasonable interpretation*" of "decisions of this Court [which] *clearly establish*" relevant principles, *Caspari*, 510 U.S. at 392, 396-97 (1994).

"[W]here Congress borrows terms of art," it also "adopts the cluster of ideas . . . attached" to the terms, evincing "satisfaction with widely accepted definitions, not a departure from them." *Morissette v. United States*, 342 U.S. 246, 263 (1952). By codifying *Teague*'s "unreasonable application of clearly established law" concept, § 2254(d) plainly provides that when a state court was forced to derive a rule by applying propositions established by preexisting law which were relevant but not controlling, review on habeas is limited to whether the application of those propositions to derive a rule was reasonable. *See O'Brien*, 145 F.3d at 24-25. "Reasonableness, in this as in many other contexts, is an objective standard"; the issue is whether the state court "acted objectively unreasonably." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997); *Stringer*, 503 U.S. at 237.

The sum and substance of § 2254(d), then, is unmistakable when its language is read with any care in the light of its origins. By codifying *Teague*'s black-letter terms, § 2254(d) requires

1) plenary "contrary to" law review (*Butler*, 494 U.S. at 414) under " 'well-established constitutional principle' " (*Penry*, 492 U.S. at 314) if Supreme Court law had specifically designed a rule for the claim when the state court acted (*see Wright*, 505 U.S. at 309 (Kennedy, J., concurring)), but
2) review only for an "unreasonable application" of existing precedent (*Gilmore*, 508 U.S. at 351

(O'Connor, J., concurring)) when the state court acted in the absence of prescribed law.[20]

"Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones v. United States*, 119 S.Ct. 1215, 1220 (1999). That tenet is conclusive when Congress conversely makes a point of taking "familiar legal expressions in their familiar legal sense" *from* "the underlying substantive law." *Henry*, 251 U.S. at 395; *Keene*, 508 U.S. at 209. And that, as we have shown, is exactly what § 2254(d) does with the key terms embodying the *Teague* doctrine. So, with the important exceptions noted (which themselves bring to full maturation the "supremacy without pre-science" seeds that *Teague* originally planted), § 2254(d)'s plain and established legal terms manifestly codify the *Teague* doctrine calling for plenary review of state-court decisions that are challenged on federal habeas as departures from the rules of constitutional law previously announced by this Court to govern that kind of decision.

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[20] *See O'Brien*, 145 F.3d at 24-25 (when "Supreme Court has prescribed a rule that governs the petitioner's claim"—including when its "holdings . . . erect a framework specifically intended for application to variant factual situations"—"habeas court gauges whether the state court decision is 'contrary to' the governing rule"; but when "there is no specific rule to which the state court's decision can be 'contrary,'" federal court asks "whether the state court's derivation of [its own] rule from the Court's generally relevant jurisprudence appears objectively reasonable"), *followed by Matteo*, 171 F.3d at 888-90. Applying this approach, the First, Second, Third, Ninth and Tenth Circuits have held that § 2254(d) requires plenary, "contrary to" review of claims under, e.g., the established, factually inclusive *Strickland* rule for ineffective assistance claims and the *Waller v. Georgia*, 467 U.S. 39 (1984), rule for open-trial claims. *See Matteo*, 171 F.3d at 899-900 (Becker, C.J., concurring in the judgment) (discussing majority opinion); *Canales v. Roe*, 151 F.3d 1226, 1229 n.2 (9th Cir. 1998); *Miller v. Champion*, 161 F.3d 1249, 1253 (10th Cir. 1998); *O'Brien*, 145 F.3d at 25 n.6; *Ayala v. Speckard*, 89 F.3d 91, 97 (2d Cir. 1996).

C. The Fourth Circuit Misread § 2254(d)

The First and Third Circuits embrace the above interpretation, with support from the Second, Ninth and Tenth. *See* note 20 *supra*. The Fourth Circuit, with support from the Fifth, Seventh and Eleventh, reads the statute to bar habeas relief in all but the rarest of cases. As we now demonstrate, the Fourth Circuit's reading tramples essential canons of construction.

To get the Fourth Circuit's reading in perspective, it is important to note that its point of departure (*see Green*, 143 F.3d at 869-73) was the Fifth and Seventh Circuits' reading, which puts only "pure law" questions in the plenary "contrary to" category of review, puts "mixed questions" in the "unreasonable application" category, and makes the latter review extremely deferential: "[A]n application of law to facts is unreasonable only when . . . reasonable jurists considering the question would be of *one view* that the state court ruling was incorrect"; if a majority and dissent disagree on a decision's correctness, that makes the decision reasonable.[21] Acknowledging that "the statute . . . makes no distinction at all between" the articulation "of a legal principle . . . and the application of such a principle to a particular set of facts," the Fourth Circuit made a single change in the Fifth-and-Seventh Circuit approach, then adopted the rest wholesale. *Id.* at 872. The one change was to give plenary, "contrary to" review to a state court's "application of law to facts *indistinguishable in any material way* from those on the basis of which the [Supreme Court] precedent was decided." *Id.* at 870 (emphasis added). Except in cases that are factually indistinguishable from one decided earlier by this Court, the "unreasonable application" clause

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[21] *Drinkard v. Johnson*, 97 F.3d 751, 768-69 (5th Cir. 1996) (emphasis added); *see Lindh v. Murphy*, 96 F.3d 856, 870, 876-77 (7th Cir. 1996) (*en banc*), *rev'd on other grounds*, 521 U.S. 320 (1997).

becomes the whole measure of review, and relief becomes available "only when the state courts have [acted] . . . in a manner that reasonable jurists would *all* agree is unreasonable." *Id.* (emphasis added).

As we have shown above, the Fifth-and-Seventh-Circuit approach confining the "contrary to law" clause to "pure" legal questions and assigning "mixed" questions to the "unreasonable application" clause is indefensible as a matter of statutory construction. Among other insuperable difficulties,[22] this reading of § 2254(d) leaves the

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[22] *See Nevers v. Killinger*, 169 F.3d 352, 359 (6th Cir. 1999) (pure-mixed division "engrafts into the statute words—'questions of law,' and 'mixed questions of law and fact'—which Congress did not place there"). Worse, § 2254(d)'s language *replaced* the House's earlier version of § 2254(d), which *did* distinguish the state court's "*interpretation* of clearly established Federal law" from its "application *to the facts* of clearly established Federal law," 141 Cong. Rec. H1424 (Feb. 8, 1995), making it "unseemly—and wrong" for the Fifth and Seventh Circuits to "scavenge discarded language from the legislative scrap heap and graft [it] onto the version of the bill that Congress ultimately enacted." *O'Brien*, 145 F.3d at 22 (reviewing § 2254(d)'s drafting history). The pure-mixed distinction also ignores the clear terms that *replaced* the rejected ones, which clearly denote plenary review of pure and mixed conclusions made when there was law to which the result could be "contrary," and "unreasonable application" review of rules derived from relevant law in the absence of controlling law. *See* pp. 33-39 *supra*. The obvious terminology to use, if Congress meant to call for deferential review of mixed-question decisions—or, more generally, of that state-court decision or result—rather than of the rule the state decision involved, is the terminology of the rejected House version—"decision was . . . [an] unreasonable application *to the facts* of . . . law," 141 Cong. Rec. H1424, *see United States v. Gaudin*, 515 U.S. 506, 512 (1995) (an "application-of-legal-standard-*to-fact* sort of question [is] commonly called a 'mixed question of law and fact' "); *Thompson*, 516 U.S. at 112-13 ("application of the controlling legal standard *to the historical facts* . . . presents a 'mixed question' ") (emphasis added)—or those of an abutting section of AEDPA, § 2254(e)(1): that the legal or mixed "determination . . . by a State court shall be presumed to be correct." Asking whether "the *decision was contrary to law*" or "*involved* an unreasonable *application of law*" is quite different.

"contrary to" clause a cipher, with *no* cases to decide. To begin with, only "pure law" questions posed by *settled* law qualify, 143 F.3d at 871, and such questions admittedly arise only when something that almost never happens, happens: when a state court misquotes this Court's rule. *See Lindh*, 96 F.3d at 877 ("contrary to" never applies if state court "correctly states the holdings" of this Court's cases). And if it *did* happen, a mere mis*statement* of law could not itself be a sufficient basis for habeas relief, since a federal court's "power is to correct wrong judgments, not to revise opinions." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945). Yet, when it comes to reviewing the judgment or decision—the application of law to fact to reach a result—the pure-mixed approach deploys *that* review to the "unreasonable application" clause. This Court has been "reluctant to adopt a construction [of one AEDPA provision] making another . . . provision superfluous," *Hohn*, 118 S.Ct. at 1976; yet a pure-mixed approach does just that.[23]

And the Fourth Circuit approach, although nominally different, is not factually or logically so. What it does is to add to the empty category of "pure law" cases arising under settled law an equally illusory class of "mixed" cases: cases that are identical in all ways to a previously decided Supreme Court case. 143 F.3d at 871-72. Of course, these "easiest cases don't even arise." *United States v. Lanier*, 520 U.S. 259, 271 (1997); *see Lindh*, 96 F.3d

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[23] A *Teague*-informed reading assigns numerous cases to each clause. *See, e.g., Strickler, Buchanan, Schiro, supra* note 9 (plenary "contrary to" review; relief denied); *Thompson, Kyles, Penry, supra* note 9 (same review; relief granted); *O'Dell, Lambrix, Gray, Caspari, Gilmore, Sawyer, Saffle, Butler, Teague, supra* ("unreasonable application" review; relief denied); and *Tuggle v. Netherland*, 516 U.S. 10, 13-14 (1995) (*per curiam*); *Stansbury v. California*, 511 U.S. 318, 322-26 (1994); *Stringer*, 503 U.S. at 230-32 (relief granted under rules Court had never before articulated but that its prior caselaw made it unreasonable for state courts to reject).

at 878 (Wood, J., dissenting) ("it is rare indeed that we will see something identical in all particulars to a case already decided by the Supreme Court"). Moreover, there is not a jot of support in § 2254(d) for limiting "contrary to" review to cases identical to a Supreme Court decision. Everything points the other way. The "decision" —the thing under review—is *all* results from applying law to fact. "Contrary to law" means *any* inconsistency with or "violation of the law at a given time"—including law evolved by fact-grounded adjudication in the common-law manner—and is *not* limited to any archetype of illegality. Questions of "law" include mixed questions. "Clearly established law" is something the Court often makes without deciding the very case. *See Lanier*, 520 U.S. at 268-72 (giving many examples). *Most* to the point, the words "decision contrary to clearly established law" codify the *Teague* formulation for plenary review under *every* type of old rule, including "a rule designed for the specific purpose of evaluating a *myriad* of factual contexts." *Wright*, 505 U.S. at 309 (Kennedy, J., concurring) (emphasis added).

The Fourth Circuit did not even purport to get its "identical case" test from the statute. Instead, it thought the "difficult[y]" of defining the statute's "overlapping" and "not . . . clear" words gave it license to *remake* the text pursuant to an alleged "plain purpose of the statute" that it neither defined nor defended but simply assumed was to shut the door tight on the writ. 143 F.3d at 869-70. Such is not acceptable interpretation. *See West Virginia*, 499 U.S. at 98 ("The best evidence of . . . purpose is the statutory text."). The most disturbing aspect of the Fourth Circuit's variation on the pure-mixed theme is its unrestrained impulse to scrap "the underlying substantive law," though every *Teague*-derived term of § 2254(d) and every interpretive tenet says to conserve it. *Keene*, 508 U.S. at 209. The court turns statutory construction on its

head, first conceding that "§ 2254(d) imports an anti-retroactivity principle into federal habeas law by requiring a habeas petitioner to demonstrate that the state court's resolution of his claim was inconsistent with federal law that was clearly established at the time his conviction became final," but then, inexplicably, "declin[ing] to interpret" the provision "as . . . codfy[ing]" any part of "the *existing* non-retroactivity doctrine of *Teague*." 143 F.3d at 873-74 (emphasis added).[24]

Equally infirm is the Fourth Circuit's self-nullifying definition of an "unreasonable application" as a ruling "reasonable jurists would *all* agree is unreasonable." *Id.* at 870 (emphasis added). Treating a ruling's existence as decisive proof of its "reasonableness" is neither logical, *see Matteo*, 171 F.3d at 889-90, nor consistent with the background habeas doctrine that reasonableness is " 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule" is reasonable, *Wright*, 505 U.S. at 304 (O'Connor, J., concurring).

Finally, the Fourth Circuit's reading breaks the "cardinal principle" that "if a serious doubt of constitutionality is raised, . . . [a] court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). The Fourth Circuit's reading "portends" at least "a serious constitutional conflict" by requiring Article III judges to give force and effect to state decisions that they are statutorily obliged to review and that, in their independent judgment, violated the supreme and established law of the land when made. *O'Brien*, 145 F.3d at 21-22.

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[24] *See also Drinkard*, 97 F.3d at 767 n.8 ("We will not complicate the task of statutory interpretation before us by turning first to the murkiness that is *Teague* retroactivity doctrine to determine whether the language of the statute somehow parallels Supreme Court precedent in this area.").

> [W]e have [never] held in the past that federal courts must presume the correctness of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.

Wright, 505 U.S. at 305 (O'Connor, J., concurring).[25]

Denying the federal courts the power to make their own decisions on issues of constitutional law that come before them and to embody those decisions in effectual judgments would defeat "the essential constitutional role

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[25] Congress often withholds federal jurisdiction to review state decisions. And it often forbids litigants to use general jurisdictional grants as a subterfuge to obtain review of state decisions that it has specifically withheld. *See* Full Faith and Credit Act, 28 U.S.C. § 1738; Anti-Injunction Act, *id.* § 2283; *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) (all barring disappointed state-court litigants—"merely [as] an attempt to get rid of [an unappealable state] judgment," *id.* at 416—from bringing a federal action claiming that the unappealable state judgment violated federal law). *Cf. Keeney*, 504 U.S. at 20 (O'Connor, J. dissenting); *McFarland v. Scott*, 512 U.S. 849, 858 (1994) (if statute, *e.g.*, on habeas, specifically *grants* jurisdiction to review state decisions, Full Faith and Anti-Injunction Acts do not apply). Likewise, federal courts resist review that the "case or controversy" limit might bar—as when federal courts decline to "advise" state courts that their decisions misstate federal law in ways that do not affect an outcome resting on an adequate state ground, *Herb*, 324 U.S. at 126, or because the error of federal law was probably harmless, *see, e.g., O'Neal v. McAninch*, 513 U.S. 432, 435 (1995). And, via *Teague*—and § 2254(d), properly read—federal courts may refuse to apply "later emerging legal doctrine" to reverse state decisions that were "valid when entered." *Sawyer*, 497 U.S. at 234. But what Congress and the Court have *never* done is order Article III courts having jurisdiction to review state decisions to give effect to those decisions that, in their independent judgment, violated supreme law when made. "Congress may be free to establish a . . . scheme that operates without court participation" but may not "instruct[] a court automatically to enter a judgment pursuant to a decision that the court has no authority to evaluate." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 430 (1995).

of the judiciary"—"the appearance and the reality of control by Article III judges over the interpretation, declaration, and application of federal law." *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir. 1984) (*en banc*) (Kennedy, J.). "The judicial Power" created by Article III includes three capacities that the Fourth Circuit reading of § 2254(d) derogates: (1) to decide every aspect of a case affecting the meaning of supreme law; (2) to do so independently, without deference to anyone save a higher federal court; and (3) to grant relief sufficient to effectuate the court's legal judgment and neutralize state statutory or decisional law in conflict with supreme law. *See Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 176-78 (1803) (Congress may not force Article III courts: to "close their eyes on the constitution, and see only the law"; to defer to Congress' reading of the Constitution; or to give effect to law found unconstitutional). The cases declaring these principles, which Congress can hardly be assumed to have disregarded or intended to confront by enacting § 2254(d), are legion.[26]

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[26] *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340-44, 358-59 (1816) (once given jurisdiction to construe a federal treaty, Court may not be limited to the "mere abstract construction of the treaty itself"; rather, "every error that immediately respects that question *must* . . . be within the cognizance of the court," including the treaty's application to the facts; nor may Court defer to a state court on a legal question on which the two courts disagree, or let the state court secure the same result by exerting a power to reject the Court's decisions on close questions; Court must have a power to make its judgment effective against the parties); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (rejecting Virginia's request that Court defer to state court on "doubtful" question of federal law: "With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us"); *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 819-23 (1824) (a federal court's power to review a state court decision must include a power to review factfindings decisive of federal rights: if "the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of

These cases belie the Fourth Circuit's answer to the obvious constitutional objections to its reading—that because "we are free, if we choose, to decide whether a habeas petitioner's conviction and sentence violate any constitutional rights," Congress in the guise of " 'regulating relief' " may forbid *all* relief and force Article III judges to give effect to legal decisions that in their judgment violated established federal law when made. *Green*, 143 F.2d

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cases only which present the particular question involving the construction of the constitution," then "words obviously intended to secure . . . rights under the constitution . . . will be restricted to the insecure remedy of an appeal, upon an insulated point, after it has received that shape which may be given to it by another tribunal"); *Ableman v. Booth*, 62 U.S. (21 How.) 506, 517, 522-23 (1858) (state court may not, by granting habeas writ freeing a federal convict, "reverse[] and annul[] the judgment of the District Court of the United States"; federal court must have power sufficiently "paramount in authority to carry" its view of supreme law "into execution"); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145-47 (1871) (Congress may not order a federal court to ignore evidence presenting a constitutional issue; to apply a "conclusive presumption" "giv[ing the evidence] an effect precisely contrary" to that "which, in its own judgment, such evidence should have" under federal law; or to surrender jurisdiction *or the power to order relief* if—after being given "jurisdiction . . . to a given point"—it finds a federal violation); *Gordon v. United States*, 117 U.S. 697, 698-99, 702 (1864) (Congress may not deprive an Article III court with jurisdiction of the power to order relief, else its judgment would be merely advisory); *Crowell v. Benson*, 285 U.S. 22, 60 (1932) ("In cases brought to enforce constitutional rights, the judicial power . . . necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."); *Norris v. Alabama*, 294 U.S. 587, 590 (1935) (an Article III court may *not* defer to a state criminal court's decision of a mixed constitutional question); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (Congress may not deny federal judgments effect because Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior [Article III] courts"—*i.e.*, the power "to render dispositive judgments"). *See generally* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696 (1998).

at 875. From *Marbury* and *United States v. Klein*, to *Plaut v. Spendthrift Farm, Inc.*, the Court has held that the judicial power requires more than "merely" an ability to issue "an opinion, which would remain a dead letter, and without any operation upon the parties." *Gordon*, 117 U.S. at 702. It requires, instead a "*Power*": an ability to enforce the court's opinion through a remedy sufficient to make binding its conclusion about the demands of supreme law.[27] This is especially so when relief is needed to neutralize a state court's decision of *law* that is found to contravene the Constitution when it was made. Otherwise Article III courts would be required to flout the Supremacy Clause by letting state courts make law in conflict with supreme law.

A court's duty is to adopt any "fairly possible" construction of a statute by which serious "constitutional questions may be avoided." *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974). The Fourth Circuit has *maximized* constitutional doubt by adopting the textually *weakest* reading. Its reading must be rejected.

D. Under § 2254(d), the Virginia Supreme Court Decision in Terry Williams' Case Was Contrary to, and an Unreasonable Application of, Clearly Established Supreme Court Law

Strickland's 1984 test for determining the prejudice required to support a claim of ineffective assistance of counsel was the controlling legal standard when the Virginia Supreme Court decided Williams' case in 1997. Such a standard is the classic "rule of . . . general appli-

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[27] *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1366 (1953) (Congress may select among remedies, but "denial of *any* remedy" is constitutionally suspect); Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 87-88 (1981) (an "objection to legislation that . . . deprives [federal courts] of jurisdiction to provide effective relief" is "at the very heart of . . . *Klein*").

cation . . . designed for the specific purpose of evaluating a myriad of factual contexts." *Wright*, 505 U.S. at 309 (Kennedy, J., concurring); *see Strickland*, 466 U.S. at 698; *and see* note 20 *supra*. Moreover, because Williams' claim arose in *Strickland*'s exact setting—a lawyer's failure to develop and present available mitigating evidence at a capital-sentencing trial—the facts of Williams' case "do[] not change the force with which [*Strickland*'s] principle applies." *Wright*, 505 U.S. at 304 (O'Connor, J., concurring).

Strickland thus provides "clearly established Federal law, as determined by the Supreme Court" to which the Virginia court's "decision" can be "contrary." And as we have demonstrated, that decision manifestly *was* contrary to *Strickland*. *See* pp. 11-16 *supra*. Indeed, by reading *Fretwell* as a general gloss on *Strickland* that converted *Strickland*'s clearly-stated probabilistic standard into an impressionistic inquiry into "fundamental fairness," the Virginia Supreme Court not only rendered a decision "contrary to" *Strickland*, but one that *displaces Strickland* as the law of the federal Sixth Amendment in Virginia. *See* pp. 17-22 *supra*.

In any event, on the facts of Williams' case, the Virginia court's decision that he would receive a "windfall" under *Fretwell* if he were given a new sentencing hearing with a competent lawyer to present the substantial mitigating evidence neglected at his original trial is *also* an "unreasonable application" of *Fretwell* itself. It cannot be immunized from correction, as the Fourth Circuit did, on the theory that a state-court decision can be found "unreasonable" only when it " 'decided the question [presented] by interpreting or applying the relevant precedent in a manner that reasonable jurists would *all* agree is unreasonable.' " (JA 498) (emphasis added). This would be akin to saying that the question whether the temperature in a building is "intolerable" must be determined,

not by asking whether anybody in the building can survive it, but by asking whether anybody in the building can imagine that anybody else might. Interposing *two* layers of insulation between reason and the Constitution is the kind of "far-reaching and seemingly perverse" action that should not be attributed to AEDPA with no support for it in the statute's text. *Stewart*, 118 S.Ct. at 1621.

CONCLUSION

Terry Williams is entitled to relief under both clauses of 28 U.S.C. § 2254(d)(1). The judgment below should be reversed with directions to vacate his death sentence.

Respectfully submitted,

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In The

Supreme Court of the United States

TERRY WILLIAMS,

Petitioner,

v.

JOHN B. TAYLOR, WARDEN, SUSSEX I STATE PRISON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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QUESTIONS PRESENTED

1. Did the Fourth Circuit correctly conclude that the plain meaning and intent of 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, prohibits the granting of federal habeas corpus relief unless the state court decision adjudicating the claim on the merits is "contrary to" the "clearly established precedent" of this Court or involves an objectively "unreasonable" application of such precedent to the facts of a given case?

2. Did the Fourth Circuit correctly define "objective unreasonableness" in terms of a state court decision "interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree was unreasonable?"

3. Did the Fourth Circuit correctly determine that the Virginia Supreme Court reasonably applied *Strickland v. Washington* and *Lockhart v. Fretwell* in finding that Williams failed to demonstrate that he was prejudiced by defense counsel's alleged errors?

4. Did the Fourth Circuit properly reject Williams' proposed revision of *Strickland* that would permit a finding of prejudice based upon the assumption that any jury includes at least one sympathetic juror who may be persuaded to hold out for a life sentence thereby preventing the jury from reaching a sentencing decision?

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STATEMENT OF THE CASE

A. The Crime, Trial and Direct Appeal

Shortly before 2:00 a.m. on Sunday, November 3, 1985, Harris Thomas Stone was found dead on his bed in his residence on Henry Street in Danville, Virginia. There was no sign of a struggle. Stone was fully clothed and no blood was observed on his body. Stone customarily kept his wallet inside his back pants pocket. The police and Stone's relatives thoroughly searched the house, but never found the wallet. The cause of Stone's death initially was thought to be heart failure or alcohol poisoning. (JA 491-492).

Almost six months later, however, the Danville Chief of Police received an anonymous letter from a local jail inmate admitting killing "that man Who Die on Henry Street." (JA 41, 492). The police interviewed Terry Williams, then confined in the Danville jail, and Williams admitted writing the letter. (JA 42, 62, 104). Williams confessed to robbing and killing Stone, as well as other crimes he had committed in Danville over a six-month period. (JA 1-2, 42, 44-45, 50-51, 69-70, 77-78).

Williams lived near Stone's Henry Street home. In his April 25, 1986, statement to the police (JA 1), Williams said that he went to Stone's home "before Thanksgiving of last year." Stone was alone and had been drinking. Williams asked to borrow "a couple of dollars," but Stone refused. The men argued and Williams "just wanted to get back at him." Stone "laid back like he had passed out." Williams looked around Stone's house for "something to use." He found a butcher knife in the kitchen but "didn't want to use it." He then found a mattock in the bathroom and returned to where Stone was lying on his bed. In his confession, Williams stated:

> He was laying on his back. I took the mattock and hit him on the chest with it. He raised up

> and was gasping for breath. He fell over to his side and I hit him on the chest with it. He raised up and was gasping for his breath. He fell over to his side and I hit him in the back with the mattock. He fell back on the bed. I went and put the mattock back in the bathroom. I came back into the room. I took his wallet from his pocket. He had three dollars in it. I got the three dollars from it. I left him there. He was still gasping for breath. I walked across Main Street bridge. I threw the wallet over the bridge into the river.

(JA 1-2).[1]

After Williams confessed, Stone's body was exhumed and an autopsy disclosed that Stone's ribs were fractured on the left side of his chest, puncturing and causing blood to collect in Stone's left lung. The cause of death was determined to be "a blunt force injury to the chest." (JA 393, 433). Williams was charged with Stone's murder.

On September 29 and 30, 1986, Williams was tried by a jury and convicted of capital murder and robbery. In a separate sentencing proceeding on September 30, the Commonwealth presented evidence of William's prior adult criminal convictions and of other offenses contemporaneous with the murder of Harris Stone. Williams had been convicted of armed robbery in 1976. In 1982, Williams was convicted of burglary and grand larceny. The victim of the latter offenses testified that Williams fought with him after the victim interrupted the crime in progress. (JA 26-27). Williams was paroled in April of 1985.

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[1] On Monday, April 28, 1986, Williams told police that he had spoken with his family over the weekend, and that Williams' mother told him he had "dreamed" of committing the murder. (JA 5, 64). On May 2, 1986, however, Williams confirmed the truth of his original April 25 confession. He corrected minor details in the original statement. (JA 5-7, 66, 80, 83).

After the murder of Stone in November of 1985, Williams committed two auto thefts and two separate violent assaults on elderly African-American victims. (JA 50-51, 69-70, 77-78). While awaiting trial in this case, Williams was convicted of arson for setting a fire in the jail. (JA 79). Williams also had made statements to a police officer concerning his thoughts about violent assaults on other jail inmates. (JA 80-81).

The prosecution presented Williams' confession to a December 4, 1985, assault and robbery of an elderly man, William Solomon, who lived near Williams' home. (JA 62). At approximately 3:30 in the morning, Williams gathered some clothing from a rack outside Solomon's residence, set the clothes on fire, and placed the burning clothes next to Solomon's door. Williams waited until Solomon opened the door and then pretended to help put out the fire. Williams went to the kitchen to retrieve water, but returned with a small knife which he used to stab Solomon in his side. He then took $52 from Solomon's pocket. (JA 69-70, 75).

Williams also had confessed to the brutal beating of 70-year-old Alberta Stroud. On the evening of March 5, 1986, Stroud was found lying on Green Street in Danville. She was unconscious and had lost "a tremendous amount of blood." (JA 33-34). Her dress had been pulled up and her underwear was wrapped around her ankles. (JA 34). She had been beaten severely causing bruising of her face, facial fractures, brain injury, and internal bleeding. (JA 38, 105-106). As a result of the damage to her brain, Stroud was left in a "vegetative state," from which she would never improve. (JA 38-39, 60-61). She was alive at the time of Williams' trial, but later died. (JA 221).

Williams told the police that he encountered Stroud walking and thought that she "said something bad or cursed me." (JA 45).

> Then I just knocked her down with my hand. When she was down I started hitting her and kicking her over and over again. I then pulled her dress up and pulled her panties down. I then started hitting on her again. She kept saying, "Stop. Please Stop."

(JA 45). According to Williams, the attack ceased only when he "got scared" and left. (JA 51).

The Commonwealth also presented expert testimony concerning Williams' mental health based on evaluations conducted at Central State Hospital. Dr. Miller Ryans, a forensic psychiatrist, testified that Williams was not mentally ill and did not have any emotional problems. Williams functioned on a "borderline level of intellectual functioning, which is between mild mental retardation and low normal intellectual level." (JA 86). After reviewing Williams' past record, particularly the prior armed robbery conviction, Dr. Ryans concluded that there was "a high probability that [Williams] would commit criminal acts of violence, and that he constitutes a continuing threat, a serious threat to society." (JA 89). Dr. Arthur Centor, a clinical psychologist, testified that his testing of Williams disclosed no mental illness or defect. (JA 96). Neurological testing also failed to suggest any disorder. (JA 97). Williams' claim that he had only dreamed about the crimes was "malingered," and testing failed to substantiate Williams' claim that "things came over him over which he had no control." (JA 97). Dr. Centor found that Williams showed "a high probability" of dangerousness based on his history and frequency of violent offenses. (JA 100).

Williams' trial attorneys presented the testimony of a forensic psychiatrist appointed by the trial court to assist the defense, two character witnesses, and Williams' mother. Dr. Paul Mansheim testified concerning Williams' statements about his prior convictions. Williams reported

to Mansheim that he removed the bullets from the gun he used to commit the robbery in 1976, "to make sure no one got hurt." (JA 110). Williams also claimed that he was wrongfully convicted of burglary and grand larceny in 1982 because he supposedly was merely helping a friend move furniture. (JA 111). Dr. Mansheim was not asked and did not offer an opinion as to Williams' dangerousness. Dorothy Moore, a minister and friend of Williams, testified that Williams was "very respectable" and that she had not known him to be violent. (JA 114-115). Deborah Grant, a friend of Williams for eleven years, also described Williams as nonviolent. (JA 119-121). Both character witnesses were cross-examined by the prosecutor about their knowledge of Williams' prior convictions. (JA 116-117, 122-123). Lulu Williams, the petitioner's mother, testified that Williams was a "nice boy" who never hurt or threatened any person in her presence, or to her knowledge. (JA 124). She stated that she could not believe that Williams committed these crimes and that "he must have been dreaming." (JA 128).

The jury deliberated for only one hour before returning a death sentence based upon the finding of a probability that Williams would commit acts of violence that would constitute a continuing serious threat to society. (JA 150; Tr. 9/30/86, p. 703). After considering the probation officer's report, the trial court sentenced Williams to death on November 19, 1986. (JA 154-155).

The Supreme Court of Virginia unanimously affirmed the convictions and death sentence on direct appeal. *Williams v. Commonwealth*, 360 S.E.2d 361 (Va. 1987). This Court denied certiorari on January 11, 1988. *Williams v. Virginia*, 484 U.S. 1020 (1988).

B. The State Habeas Corpus Proceedings

Williams' initial habeas corpus petition was filed in the Danville Circuit Court on August 26, 1988. More than six years later, an amended petition was filed on April 24, 1995, and the circuit court held an evidentiary hearing on Williams' ineffective counsel claims on June 15-16, 1995.[2] On August 15, 1996, the court filed its Findings of Fact and Recommended Conclusions of Law (JA 382-429) concluding that trial counsel were effective in all circumstances of the trial but one: according to the state habeas court, trial counsel's failure to present certain mitigating evidence at sentencing warranted relief. (JA 424). Specifically, the circuit court found that the following evidence was available at the time of Williams' trial but had not been presented (JA 423): a report in petitioner's records from a juvenile commitment to Beaumont Correctional Center (JA 523-547), and statements from Williams' siblings (JA 322-323, 330-335, 576-585), describing conditions in the Williams' household during Williams' youth; and the possible testimony of Williams' wife (JA 573-574), 11-year-old daughter (JA 571), and Williams' friend Bruce Elliott.[3] (JA 563-566).

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[2] In 1995, the Virginia General Assembly amended the state habeas statute to vest exclusive jurisdiction in the Virginia Supreme Court with respect to petitions filed by prisoners under sentence of death. Va. Code § 8.01-654(C)(1). Jurisdiction over Williams' petition, which was filed in the circuit court prior to the change in law, was transferred to the Supreme Court on July 1, 1995. That court then directed the circuit court to report its findings of fact and recommended conclusions of law regarding the ineffective counsel claims that had been the subject of the June 1995 evidentiary hearing. (JA 430-432).

[3] Williams did not call these last three individuals to testify at the 1995 evidentiary hearing, so they were not cross-examined. Their testimony merely had been proffered by

The Beaumont records consisted of 47 pages of documents concerning Williams' incarceration as a juvenile. (JA 523-547). Williams was committed to the juvenile system for the first time when he was 11 years old, for aiding and abetting larceny. He was committed again when he was 12 for making a false fire alarm. In 1971, when he was 15, he was committed for three counts of breaking and entering. (JA 534-536; Pet. Ex., Vol. VII, Ex. C. No. 40 at 13). He remained under the authority of the juvenile authorities until he reached age 21. (JA 540).

Included in the juvenile records was a November 1967 report concerning Williams' home life, which discussed events that occurred 10 years earlier when Williams was an infant. (JA 528-533). In 1957 Terry Williams and four other Williams children were removed from their parents' custody because they had allowed the children to become intoxicated on bootleg whiskey, and had failed to take care of their children due to their own drinking. Williams' parents were convicted and jailed for neglecting the children. (JA 528-529).

According to the report, however, by 1967 Williams' father had forsaken excessive drinking and bootlegging. (JA 531). The father also was "regularly employed," "cooperative with the Court," "shows a genuine interest in his children," and "great concern over his family when they get involved in trouble." Mrs. Williams had "a great love and interest in her children but due to her limitations she seems to be ineffectual in disciplining them." (JA 531). According to the report, Williams' parents "always try to be cooperative and they say that they try to keep close touch on Terry but he just seems to slip away and go about the neighborhood doing as he

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affidavit. Williams' mother and brother testified at the habeas hearing about petitioner's upbringing. (JA 318-339).

pleases." (JA 530). The report also summarized Williams' early involvement with the juvenile authorities: an incident involving malicious property damage at age 8; bicycle theft in 1966; and disorderly conduct, malicious damage, burglary, and larceny charges in 1967. (JA 530-531).

Four of Williams' siblings submitted affidavits describing Williams' childhood and the beatings he allegedly received from his father when he did something wrong. (JA 576-585). According to these affidavits, Williams' father was stricter with Williams than with his other children. (JA 580). Williams' family thought he was not a "violent person." (JA 576, 579, 583, 584).[4]

Williams' daughter, who had been 11 years old at the time of trial, offered an affidavit that described Williams as "a good daddy," for the three years of her life that he was not imprisoned. (JA 571). Williams' ex-wife's affidavit described the three years (1973-1976) she had been married to Williams. (JA 573).

Finally, the state habeas judge noted an affidavit from Bruce Elliott, an accountant who had met Terry Williams

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[4] Prior to trial, defense counsel had asked Williams and his family "to tell us anything or anyone who could possibly help Terry or provide us with any information." (JA 208, 227, 235-236). Counsel used what little information was provided. (JA 208). Mrs. Williams, moreover, did not suggest in her trial testimony that petitioner was abused as a child or that he was raised in an alcoholic background. (JA 124-128). She gave no such information to defense counsel when she was asked before trial for any information that could help Williams. (JA 227, 235, 324-329). The affidavits of Williams' brothers and sisters did not claim that any of them ever advised defense counsel before trial of any abuse of Williams by his father. (JA 576-585). According to Williams' trial counsel, "every indication we had [from the family] was that they had tried to provide Terry with a good, loving stable Christian home." (JA 235).

in 1978 while Williams was incarcerated for his 1976 conviction for robbery. (JA 563-566). Elliott had been involved in a local church's prison ministry program and saw Williams frequently. Elliott stayed in contact with Williams after he was transferred to a different correctional unit, and while Williams was on parole. (JA 563-564). Elliott's affidavit stated that he would have testified that Williams was proud of his accomplishments in prison, and that he was mild mannered, not aggressive. (JA 564).

Williams' trial attorneys acknowledged that they generally had been unaware of the evidence Williams had proffered at the state habeas hearing. They had presented character witnesses at trial to show that Williams had some redeeming qualities, but the effort had provided opportunities for the prosecutor to remind the witnesses, and the jury, of Williams' violent criminal history. (JA 245-246). Defense counsel knew of other witnesses who could testify for Williams, but decided against presenting additional character testimony.[5] (JA 245-246). ***The state habeas judge expressly found that counsel made a tactical decision to avoid additional character witnesses and thereby deny the Commonwealth additional opportunities to reemphasize Williams' criminal record,*** but concluded that some testimony should have been offered ***"for whatever it was worth."*** (JA 400-401, emphasis

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[5] Defense counsel obtained the assistance of a court-appointed psychiatrist, and also discussed the case with one of the Commonwealth's mental health experts. (JA 193-194, 222-223, 231-232). Defense counsel knew that Williams did not have a steady job history or any positive evidence from his life in Danville. (JA 221). As a matter of strategy, defense counsel determined that it would be in Williams' best interests to ask the jury for mercy, relying on his confession and assistance to the police as evidence of his remorse. (JA 221, 222).

added). The circuit court recommended that the writ issue to grant Williams a new sentencing. (JA 424).

Both Williams and the Warden filed objections in the Virginia Supreme Court to the state habeas judge's findings and recommendations. On January 13, 1997, the Virginia Supreme Court ordered briefing and argument on the one issue that the circuit court found warranted relief, and accepted the lower court's recommended dismissal of all other claims. On June 6, 1997, the Virginia Supreme Court unanimously rejected the circuit court's recommendation for sentencing relief, and denied the writ. *Williams v. Warden*, 487 S.E.2d 194 (Va. 1997). (JA 430-444). The Court ruled that the state habeas judge's recommendation was based on an erroneous, "per se" understanding of *Strickland* prejudice. The circuit court had concluded that "mitigating evidence is absolutely crucial and if none is offered, this amounts to prejudice" (JA 444), and that Williams' defense needed "anything and everything that might be available as favorable evidence," and "[a]nything less was not enough." (JA 444). The Virginia Supreme Court expressly found that Williams' "assertions about the potential effects of the omitted proof do not establish a 'reasonable probability' that the result of the proceeding would have been different, nor any probability sufficient to undermine confidence in the outcome." (JA 441).

C. The Federal Habeas Proceedings

On September 29, 1997, the United States District Court for the Eastern District of Virginia stayed Williams' execution and appointed federal habeas counsel. Williams' petition was filed on December 12, 1997, and on April 7, 1998, the district court ordered that his death sentence be vacated based upon the same ineffective counsel claim upon which the state habeas judge had

relied. (JA 464-477). The remaining allegations of the petition were dismissed. (JA 445).

On December 18, 1998, the United States Court of Appeals for the Fourth Circuit reversed the district court's order granting the writ, finding that Williams' ineffective counsel claim did not merit relief and that the Virginia Supreme Court's rejection of Williams' claim was neither contrary to, nor an unreasonable application of, clearly established precedent of this Court. *Williams v. Taylor*, 163 F.3d 860, 869-870 (4th Cir. 1998). (JA 489-520). The Fourth Circuit affirmed the district court's dismissal of Williams' remaining claims. Williams' petition for rehearing was denied on January 15, 1999.

On February 10, 1999, as required by Virginia Code § 53.1-232.1(iii), the Danville Circuit Court set Williams' execution for April 6, 1999. Williams filed his petition for a writ of certiorari in this Court on March 5, 1999. On April 2, 1999, this Court stayed Williams' execution, and subsequently granted Williams' certiorari petition on April 4, 1999.

SUMMARY OF THE ARGUMENT

One of the most important aspects of the federal habeas corpus reforms embodied in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") is Congress' amendment of 28 U.S.C. § 2254(d). The amended statute creates a general rule prohibiting federal collateral relief on the basis of any claim that the state court decided on the merits, subject only to narrow exceptions for decisions which are "contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States," or which are based on an "unreasonable determination" of the facts. As this Court recognized in *Lindh v. Murphy*, 521 U.S. 320, 334 (1997), the present

version of § 2254(d) provides a "highly deferential standard for evaluating state court rulings."

In a tactic driven by the inherent weakness of his underlying ineffective counsel claim, Williams proposes an interpretation of § 2254(d) that would avoid giving any deference to the reasonable decision of the Virginia Supreme Court that he had failed to demonstrate the "prejudice" required under *Strickland v. Washington*, 466 U.S. 668 (1984). Ignoring Congress' clear intent to reform and curb federal habeas review of state court decisions, he argues that § 2254(d) as amended leaves intact the prior rule of de novo review. According to Williams, Congress "codified" the anti-retroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989), but otherwise failed to change the law in any significant respect. His reading of the statute, however, cannot be reconciled with either the statute's text or Congress' expressed intent to create a "highly deferential" standard of review.

Amended § 2254(d) builds upon *Teague*'s goal of validating a state court's reasonable interpretations and applications of this Court's precedents, but Congress did not merely codify *Teague*. Rather, the clear intent of Congress, as expressed by the plain meaning of the text of § 2254(d) and demonstrated by its unambiguous legislative history, was to prohibit federal habeas relief when the state court reasonably identified and applied this Court's clearly established precedent.

The Fourth Circuit correctly upheld the Virginia Supreme Court's reasonable application of *Strickland*'s clearly established "prejudice" standard. Williams was afforded a full and fair evidentiary hearing in the state court, and the Virginia Supreme Court unanimously, and reasonably, determined that he had failed to demonstrate that, absent his trial counsel's alleged errors, there was a reasonable probability that the jury's sentencing verdict

would have been different. The Fourth Circuit also determined correctly that the state court's reasonable finding of no *Strickland* prejudice was not rendered unreasonable by virtue of the state court's additional finding that Williams' trial was fair and his sentence reliable. Williams' claim that the Virginia Supreme Court erred by referring to this Court's decision in *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993), not only mischaracterizes the state court's decision, but fails to recognize *Strickland* and *Fretwell*'s common emphasis upon the core value protected by the Sixth Amendment's right to effective counsel: the reliability of the factfinder's decision.

Williams asks this Court to recast *Strickland*'s "prejudice" inquiry in terms of whether there is a reasonable probability that at least one juror would have held out for a life sentence thereby preventing the jury from reaching a sentencing decision. This Court, however, never has held or even suggested that *Strickland* prejudice may be measured by speculation about the hypothetical propensities of individual jurors or that the Sixth Amendment somehow protects a criminal defendant's supposed interest in a jury's inability to reach a verdict. To the contrary, *Strickland* itself expressly held that, in the context of a capital sentencing proceeding, the "reasonable probability" test focuses upon the likelihood that, in the absence of counsel's alleged errors, the factfinder would have decided to impose a life sentence rather than a death sentence. The Fourth Circuit thus correctly concluded that Williams' proposed "one juror" standard simply cannot be reconciled with the objective inquiry mandated by *Strickland*, and this Court should reject Williams' attempt to eviscerate *Strickland*'s purposefully stringent standard for assessing whether a petitioner is entitled to relief on the basis of his own counsel's alleged errors or omissions.

ARGUMENT

Consistent with his argument that 28 U.S.C. § 2254(d) has not altered, in any significant way, federal collateral review of a state prisoner's claims for relief, Williams first addresses the merits of his ineffective counsel claim, concludes that he is entitled to relief and only then discusses whether the standard mandated by Congress permits such de novo review. Williams has it backwards. Section 2254(d) presents federal habeas courts with a threshold question that governs whether the state prisoner will be entitled to relief, a question that should be decided first, not last. *See generally Collins v. Youngblood*, 497 U.S. 37, 40-41 (1990) (*Teague* question presents threshold matter in collateral review).

I. SECTION 2254(d) CREATES A "HIGHLY DEFERENTIAL" STANDARD OF REVIEW WHICH PROHIBITS FEDERAL HABEAS CORPUS RELIEF UNLESS THE STATE COURT DECISION IS "CONTRARY TO," OR "AN UNREASONABLE APPLICATION OF," THIS COURT'S "CLEARLY ESABLISHED PRECEDENTS."

In enacting § 2254(d),[6] Congress generally prohibited the granting of federal habeas corpus relief on the basis

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[6] The statute now reads:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

of a claim that the state court adjudicated on the merits. This general rule is made subject to narrow exceptions where the state court adjudication of a prisoner's claim was either "contrary to, or involved an unreasonable application of, clearly established Federal law," as determined by this Court, or where the state court decision "was based upon an unreasonable determination of the facts."[7]

Congress' policy decision to prohibit federal habeas relief generally after state courts have determined the merits of a state prisoner's claim plainly abolishes the concept of de novo review which prevailed before AEDPA and which generally denied a state court's merits decision any legal effect in all but the "new rule" and Fourth Amendment cases.[8] As this Court explicitly has

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[7] Williams raises no question concerning the reasonableness of the state court's factual determinations. AEDPA strengthened the long-maintained presumption of correctness regarding state court factual findings. Section 2254(e)(1) reiterates the presumption, and stipulates that a petitioner may overcome the presumption only with "clear and convincing evidence." The eight former "exceptions" to the presumption have been abandoned.

[8] The courts of appeals have been unanimous that de novo review of a state prisoner's claims, in the sense that federal habeas relief may be granted on the basis of a federal court's simple disagreement with the state court decision rejecting a claim, has been replaced by § 2254(d)'s "highly deferential" standard of review. *See Long v. Humphrey*, ___ F.3d ___, 1999 U.S. App. LEXIS 15986, *8 (8th Cir. 7/14/99); *Matteo v. Superintendent*, 171 F.3d 877, 888, 890 (3rd Cir. 1999); *Nevers v. Killinger*, 169 F.3d 352, 361 (6th Cir. 1999); *O'Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir. 1999); *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 844 (1999); *Neeley v. Nagle*, 138 F.3d 917, 924 (11th Cir. 1998), *cert. denied*, 119 S.Ct. 811 (1999); *Drinkard v. Johnson*, 97 F.3d 751, 868 (5th Cir. 1996), *cert. denied*,

recognized, AEDPA instead provides a "highly deferential standard for evaluating state court rulings." *Lindh*, 521 U.S. at 334.

Congress thus has chosen to allocate to the state courts the primary responsibility for enforcing constitutional requirements in state criminal cases that have become final on direct appeal. State prisoners' opportunity for independent federal collateral review is reserved for the rare occasions where the state courts' decisions depart from this Court's clear statements of the Constitution's requirements. Congress has fixed that point of departure by reference to whether the state court's decision was "contrary to" or "involved an unreasonable application of" this Court's "clearly established" precedents. Given the ordinary meaning of the terms Congress chose, and the meaning of those terms as used by this Court in the context of federal collateral review of state court criminal judgments, it is clear that § 2254(d) now prohibits federal habeas relief when the state courts reasonably identify and apply this Court's precedents.

A. Prior to AEDPA, a federal habeas court generally reviewed a state prisoner's claims de novo, granting no deference to the state court decision.

At the time Congress enacted AEDPA, federal courts generally reviewed a state prisoner's claims that he was "in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C § 2254(a), under a

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520 U.S. 1107 (1997); *Lindh v. Murphy*, 96 F.3d 856, 871 (7th Cir. 1996), *rev'd on other grounds*, 521 U.S. 320 (1997).

standard of review alternatively described as "independent," "de novo," or "plenary."[9] *See Townsend v. Sain*, 372 U.S. 293, 311-312 (1963) (using all three terms). Such review, however, was subject to both statutory and judicial limitations. The ability of a federal habeas court to revisit factual findings made by state courts was circumscribed by the "presumption of correctness" found in former § 2254(d), *see, e.g., Sumner v. Mata*, 449 U.S. 539 (1981), and § 2244(b) limited consideration of successive petitions. This Court's decisions also prohibited or limited collateral review for certain categories of claims. *See Stone v. Powell*, 428 U.S. 465 (1976) (federal habeas relief not available for Fourth Amendment claims where state has provided opportunity for full and fair litigation); *Coleman v. Thompson*, 501 U.S. 722 (1991) (federal relief generally precluded for claims barred by adequate and independent state law ground).

Moreover, in a series of cases beginning with *Teague v. Lane*, the Court set out its "new rule" doctrine further limiting the scope of federal collateral review.[10] In its most basic form, the *Teague* doctrine prevents federal

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[9] The precise point in time when de novo review became the rule for federal collateral review of state court convictions has been debated, *see Wright v. West*, 505 U.S. 277, 285-288 (1992) (Thomas, J.), and *id.* at 297-298 (O'Connor, J., concurring), but the concept of de novo review certainly had been accepted at least since *Brown v. Allen*, 344 U.S. 443, 458-465 (1953). *See West*, 505 U.S. at 289 n.6. (Thomas, J.).

[10] *See also Penry v. Lynaugh*, 492 U.S. 302 (1989); *Butler v. McKellar*, 494 U.S. 407 (1990); *Saffle v. Parks*, 494 U.S. 484 (1990); *Sawyer v. Smith*, 497 U.S. 227 (1990); *Stringer v. Black*, 503 U.S. 222 (1992); *Wright v. West, supra; Graham v. Collins*, 506 U.S. 461 (1993); *Gilmore v. Taylor*, 508 U.S. 333 (1993); *Caspari v. Bohlen*, 510 U.S. 383 (1994); *Gray v. Netherland*, 518 U.S. 152 (1996); *Lambrix v. Singletary*, 520 U.S. 518 (1997); *O'Dell v. Netherland*, 521 U.S. 151 (1997).

habeas courts from reversing a state court judgment based on precedent decided after the state prisoner's case became final on direct appeal, or from creating or applying such "new rules." In the absence of an "old rule" sufficiently specific to require its application by the state court, the state court's reasonable interpretation of existing precedent must be upheld, subject only to two narrow exceptions.[11] "The 'new rule' principle therefore validates reasonable, good faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler*, 494 U.S. at 414.

In *West*, the Court debated, but ultimately did not decide, whether *Teague*'s goal of "validat[ing]" reasonable state court interpretations of precedent should be extended to review of state court decisions involving the application of law to fact. *See West*, 505 U.S. at 289-291 (Thomas, J.) (questioning de novo review of "mixed legal questions;" under *Teague*, "federal habeas court 'must defer to the state court's decision rejecting the claim unless that decision is patently unreasonable.' "); *id.* at 304 (O'Connor, J., concurring) ("In *Teague*, we refused to give state prisoners the benefit of new rules of law, but we did not create any deferential standard of review with regard to old rules"); *id.* at 307 (Kennedy, J., concurring) (*Teague* rule not in conflict with de novo review of mixed questions and "did not establish a deferential standard of review of state-court decisions of federal law"). Thus, the end result of *West* was to leave the "new rule" doctrine

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[11] *Teague* recognized exceptions for a "new rule" that places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or "requires the observance of those procedures that . . . are implicit in the concept of ordered liberty." 489 U.S. at 311 (citation omitted).

firmly in place as to pure questions of federal law, but to defer to Congress on the issue of whether de novo habeas review should be abolished regarding applications of established rules to the facts of particular cases. As Justice O'Connor concluded, for the Court to effect such a change would be "far-reaching" in light of this Court's precedents and Congress' previous rejections of a deferential standard of review. *See West*, 505 U.S. at 305-306 (O'Connor, J., concurring). Congress now has acted, however, and clearly has mandated the type of deference to state court determinations of mixed questions of law and fact that *West* declined to mandate.

B. The general prohibition of relief under § 2254(d) evinces Congress' intent to create a rule of deference to state court applications of federal law.

This Court previously has recognized that AEDPA created a "highly deferential standard for evaluating state court rulings." *Lindh*, 521 U.S. at 334. In clear and unmistakable terms, Congress now has mandated the general rule that a state court "decision" on all issues "adjudicated on the merits," must be upheld by a federal habeas court, unless certain narrow exceptions are found. *See* § 2254(d) ("An application for a writ of habeas corpus . . . ***shall not be granted*** . . . unless . . . ."). When interpreting an act of Congress, this Court's first responsibility is to view the language Congress used as the most reliable indication of intent. *See Holloway v. United States*, 119 S.Ct. 966, 969 (1999). There can be no doubt that Congress' intent in enacting AEDPA was to limit the availability of federal relief, and the general prohibitory language employed by Congress refutes any argument that federal habeas courts still retain the authority to grant relief merely because they disagree with a state

court's decision on a matter of federal law.[12] By declaring that federal collateral relief generally "shall not be granted," Congress has mandated deference to the decisions of state courts in all but the exceptional cases which are narrowly defined in § 2254(d)(1) and (2).

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[12] Williams argues that interpreting § 2254(d) to create a deferential standard of review would raise a potential constitutional conflict because Article III judges are obligated to independently determine constitutional questions. (Pet. Br. at 43-48). This Court, however, specifically refused review of Williams' question 4 presented in his certiorari petition which raised the identical argument. (Pet. Cert. at 32). Moreover, Williams presented his constitutional argument in the court below only in the most "cursory fashion," leading the Fourth Circuit to question whether the issue even was "properly" before the court. (JA 498). This Court should not allow Williams to smuggle his defaulted claim back into the case. In any event, Congress' express limitations on the availability of the habeas *remedy* are little different from the judicially-imposed limitations that existed prior to AEDPA without valid constitutional objection. *See, e.g., Stone v. Powell, supra; Wainwright v. Sykes*, 433 U.S. 72 (1977); *Coleman v. Thompson, supra; Teague v. Lane, supra*. Indeed, even under Williams' view of § 2254(d), an Article III court still is denied the power to review de novo a "reasonable application" of law. Congress has made the state courts the primary and, in most cases final, arbiter of federal claims challenging state court criminal judgments. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("judgments about the proper scope of the writ are 'normally for Congress to make' "), *quoting Lonchar v. Thomas*, 517 U.S. 314, 323 (1996). *See generally* Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 Columbia L. Rev. 888 (1998). Congress clearly trusts the state courts to be up to the task, just as this Court has recognized that state courts are "coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution." *Sawyer v. Smith*, 497 U.S. at 241. *See also Brecht v. Abrahamson*, 507 U.S. 619, 636 (1993).

C. A federal court may grant habeas relief only if the state court decision is "contrary to or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States."

The terms "contrary to" and "unreasonable application of" both describe a degree of conformity and consistency with prior decisions. *See Green*, 143 F.3d at 870; *Matteo*, 171 F.3d at 891. In choosing these terms, Congress specified the degree to which a state court decision must depart from this Court's precedents to warrant the exceptional intervention into the state's criminal processes represented by the granting of federal collateral relief. All courts of appeals that have addressed the meaning of § 2254(d)'s exceptions have agreed that Congress intended federal courts to retain the authority to invalidate state court decisions under a "contrary to" analysis only if this Court's precedents required the state courts to apply a specific rule and produce a specific result, and the state court nevertheless reached a "contrary" conclusion. And, decisions involving a state court's application of this Court's clearly-established precedents to the particular facts of a prisoner's case – mixed questions of law and fact – can be reviewed only for "an unreasonable application of" such precedent.[13]

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[13] *See Matteo*, 171 F.3d at 888-891 ("contrary to" applies if controlling precedent requires outcome contrary to state court decision; "unreasonable application" objectively determines whether application of precedent to facts produces outcome not justified under reasonably existing precedent); *Nevers*, 169 F.3d at 360-361 (in absence of clear Supreme Court rule requiring certain result, state decision not "contrary to" precedent; decisions on mixed questions "unreasonably apply" precedent if no reasonable jurists would agree with result); *O'Brien*, 145 F.3d at 24-25 ("contrary to" addresses decisions where Supreme

1. "Clearly established Federal law, as determined by the Supreme Court of the United States," establishes a deferential standard of review.

By requiring that a state court's decision be measured against "clearly established Federal law, as determined by the Supreme Court of the United States," Congress imposed two distinct limitations upon federal habeas review. First, by specifying that state courts are obliged to follow *this Court's* precedents, Congress made abundantly clear that state court decisions cannot be overturned merely on the basis of precedent from the lower federal courts. This limitation is firmly grounded in the principles of federalism which in recent years this Court has brought to the forefront of federal collateral review. *See Lockhart v. Fretwell*, 506 U.S. at 376 (Thomas, J., concurring) ("The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation."); *Caspari*, 510 U.S. at 395 (1994) ("Constitutional law is not the exclusive province

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Court rule governs claim and requires particular outcome; "unreasonable application" refers to state court's objectively reasonable application of rule to factually different circumstances); *Green*, 143 F.3d at 869-870 ("contrary to" applies to questions of law or case of "square conflict;" "unreasonable application refers to application of precedent to facts); *Neeley*, 138 F.3d at 923-924 ("contrary to" applies when Supreme Court precedent compels particular result; "unreasonable application" refers to mixed questions); *Drinkard*, 97 F.3d at 767-768 ("contrary to" refers to errors of pure law, "unreasonable applications" to mixed questions); *Lindh*, 96 F.3d at 869-870 (federal courts have independent authority to determine issues of federal law but must uphold reasonable decisions of state court on mixed questions).

of the federal courts, and in the *Teague* analysis the reasonable views of the state courts are entitled to consideration along with those of federal courts.")

Just as importantly, "clearly established Federal law" is a term of art with a settled and specific meaning that Congress clearly borrowed from this Court's qualified immunity and *Teague* cases. In the context of federal civil rights actions, public officials' liability for money damages is limited "insofar as their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added). The availability of immunity "turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time" of the conduct. *Wilson v. Layne*, 119 S.Ct. 1692, 1699 (1999), *quoting Anderson v. Creighton*, 483 U.S. 635, 639 (1987). The "clearly established" determination requires an assessment of the "level of generality at which the relevant 'legal rule' is to be established," which means:

> the contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in light of preexisting law the unlawfulness must be apparent.

Wilson, 119 S.Ct. at 1699, *quoting Anderson*, 483 U.S. at 640.

This Court, moreover, expressly has linked *Anderson*'s definition of "clearly established" law to *Teague*'s "new rule" analysis. *See Sawyer*, 497 U.S. at 236 (relying on *Anderson* test to assess level of generality of clearly

established law); *West*, 505 U.S. at 313 (Thomas, J.) (prisoner must be able to show "in light of authority extant when his conviction became final [that] its unlawfulness was apparent").

The *Teague* analysis asks whether the prisoner seeks the benefit of a "new rule," one not "dictated" or "compelled" by existing precedent, and requires a "survey of the legal landscape" to determine if "the unlawfulness of [the prisoner's] conviction was apparent to all reasonable jurists" at the time the prisoner's conviction became final on direct appeal. *See Lambrix*, 520 U.S. at 527-528. *Teague*'s concept of "dictated by precedent" thus parallels and essentially replicates *Anderson*'s "clearly established" requirement. Both inquiries serve the same purpose of defining the state of the law at the relevant time, and both require a degree of specificity in the existing rule before the availability of a remedy may be determined on an objective standard of reasonableness.

By stressing that § 2254(d)(1)'s exception applies only when the state court's decision is "contrary to clearly established Federal law," Congress selected a standard of review far more limited than "de novo," "independent" or "plenary" review.[14] Rather, the alleged departure from

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[14] The Federal Magistrate Act, 28 U.S.C. § 636, and Rule 72, F.R. Civ.P., both make a clear distinction between "clearly erroneous or contrary to law," *see* 28 U.S.C. § 636(b)(1)(A), Rule 72(a), and "de novo." *See* § 636(b)(1)(c), Rule 72(b). Congress thus unquestionably understands "clearly erroneous or contrary to law" to constitute a more circumscribed standard of review than "de novo." *See Gomez v. United States*, 490 U.S. 858, 874 (1989) (describing "clearly erroneous or contrary to law" as "less stringent" than de novo review). To the extent that "contrary to law" has been interpreted in the context of a superior court's review of an *inferior* court's legal conclusions, it

the requirements of this Court's established precedents must be so starkly unreasonable as to make the "unlawfulness" of the state court decision "apparent" before a state court decision can be considered "contrary to" the controlling rule.

2. "Contrary to" focuses on the state court's identification of the governing rule.

The *Teague* cases clearly demonstrate this Court's understanding of the term "contrary to precedent" in the context of federal collateral review. *Teague* requires that the federal habeas court determine whether the rule the state prisoner is seeking is "old" or "new" and, if the rule the prisoner seeks was not "dictated by precedent" at the time his conviction became final on direct appeal, it is "new." The state court's failure to identify and apply "new" rules will not result in the granting of federal collateral relief if in doing so the court reasonably interpreted existing precedent. *Teague* thus "validates" a state

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obviously has no application to a lower federal court's collateral review of the decision of a coequal state court, which more closely resembles a court's review of an agency decision. An agency's interpretation of the law governing its actions, when that agency has been vested with "primary and substantial responsibility for administering and enforcing" the law, is entitled to deference by the reviewing court. *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981). Indeed, the agency's action is not "contrary to law if it is sufficiently *reasonable* to be accepted." *Id.* at 39 (emphasis added). *See also Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984) (setting out principles for judicial review of agency decision when Congress has spoken to precise issue and when agency must construe statute).

court's reasonable, good-faith interpretations of precedent, "even though they are shown to be *contrary to later decisions.*" *Butler*, 494 U.S. at 414 (emphasis added). By definition, the state court's decision in that circumstance was not "contrary to" existing precedent when the state court ruled. A state court, however, is not free to ignore "old rules" – this Court's "clearly established" precedent – and the failure to select and apply an "old rule" that represents "clearly established Federal law" renders the state court decision "contrary to" precedent.[15]

Williams argues that limiting the "contrary to" exception to the state court's selection of the appropriate rule creates an "empty category" of cases because state courts

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[15] The Fourth Circuit's interpretation of § 2254(d) also would find a decision to be "contrary to precedent" if the application of the rule to the particular facts of a state prisoner's case was so "unreasonable" as to render the decision intolerably inconsistent with precedent. Thus a state court may not, after identifying the correct legal standard, apply the rule to facts "indistinguishable in any material respect," and reach the opposite result as the precedent. *See Green*, 143 F.3d at 869. And, a state court may not apply existing precedent in a different factual context where it is "indisputably unjustified," or fail to apply precedent where the precedent's principle clearly does apply. *Id.* This "rule identification" analysis also finds parallels in the "new rule" analysis. *See Penry*, 492 U.S. at 314 (distinguishing whether rule is new or simply applies well established principle to govern analogous case); *Butler*, 494 U.S. at 414 (rejecting argument that claim was merely application of "old" rule to new facts); *West*, 505 U.S. at 304 (O'Connor, J., concurring) (*Teague* inquiry asks "whether case under consideration is meaningfully distinguishable" from prior precedent); *Stringer*, 503 U.S. at 228 (principles "underlying our new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent").

are unlikely to choose incorrectly or misstate the appropriate rule.[16] Williams certainly is right to be confident that the state courts generally will identify and apply the correct federal rule. Congress fully recognized the state courts' ability to "get it right," but intended to provide a remedy reserved for the extraordinary circumstance where the state courts fail to do so.[17] It is in that rare circumstance, where the state court decision itself demonstrates a departure from the governing rule clearly established by this Court that § 2254(d)'s prohibition against federal collateral relief is surmounted, and the federal court is free to apply the correct federal rule independently.

Williams' proposed definition of "contrary to clearly established Federal law," on the other hand, would allow the statute's exception to swallow the general rule. Under his interpretation of § 2254(d)(1), a federal court would continue to exercise "plenary" review over the question of whether the state court decision is "contrary to" precedent, and that would include independently deciding any claim invoking a rule "designed for the specific purpose of resolving the relevant claim." (Pet. Br. at 35). Williams

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[16] Williams ignores the fact that in this very case he claims that the Virginia Supreme Court identified the wrong rule for deciding his ineffective counsel claim. (Pet. Br. at 17-22).

[17] 142 Cong. Rec. S3446-S3447 (April 17, 1996) (statement of Sen. Hatch) ("Federal habeas review exists to correct fundamental defects in the law. After the State court has reasonably applied Federal law, it is hard to say that a fundamental defect exists."); 141 Cong. Rec. S7848 (June 7, 1995) (statement of Sen. Hatch); *id.* at S7843 (statement of Sen. Biden) (statute "dramatically restricting" federal court's power to say state court "got it wrong").

thus reads § 2254(d) as requiring de novo review for the vast majority of claims that are raised in federal habeas,[18] and merely codifying *Teague* to permit its continued application in those cases where it already applies.[19] By

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[18] Williams studiously avoids saying "de novo" review and instead uses the terms "plenary review" and "independent judgment." The terms he chooses, however, are indistinguishable from "de novo" review. *See Miller v. Fenton*, 474 U.S. 104, 115 (1985) (describing review of mixed questions as "plenary" and "independent"); *West*, 505 U.S. at 289 and n.6 (Thomas, J.) (describing review as plenary, independent and de novo); *id.* at 303 (O'Connor, J.) (reciting history of de novo review standard of mixed questions); *Salve Regina College v. Russell*, 499 U.S. 225, 240 (1991) (Rehnquist, C.J., dissenting) (equating terms "plenary," "independent" and "de novo," and distinguishing terms from "deferential.").

[19] Section 2254(d) does borrow terms used by the Court in the "new rule" analysis, and certainly preserves the "new rule" doctrine, but Congress did not merely "codify" *Teague*. Section 2254(d) does not codify *Teague*'s exceptions, and does not employ the "new rule" language Congress explicitly used elsewhere in AEDPA, *see* §§ 2244(b)(2)(A), 2254(e)(2) and 2264(a)(2), thereby "demonstrating that Congress was fully aware of, and able to invoke, the *Teague* doctrine, if it so chose." *See Green*, 143 F.3d at 874 n.1; *see also Lindh*, 521 U.S. at 330 (provision in Chapter 154 of AEPDA for application to pending cases creates negative implication that remainder of the Act is to be treated differently). Moreover, no member of Congress who addressed the bill suggested that it merely codified *Teague* and, as every member of Congress speaking for or against the bill was aware, the statute clearly was intended to change existing law substantially by providing a deferential standard of review. *See* 141 Cong. Rec. S7835 (June 7, 1995) (statement of Sen. Lott in favor); *id.* at S7838-S7839 (statement of Sen. Cohen, opposed); *id.* at S7841, S7842, S7843 (statement of Sen. Biden, opposed); *id.*, S7847 (statement of Sen. Specter, in favor); *id.* at S7848 (statement of Sen. Hatch, in favor); 142 Cong. Rec H2182 (Mar. 13, 1996) (statement of Rep. Hyde, in favor); *id.*, at H2183 (statement of Rep. McCollum, in favor); 142 Cong. Rec. H2248

enacting § 2254(d)'s general rule of prohibition, however, Congress clearly did not intend to codify the status quo. To the contrary, Congress intended to abolish de novo review of mixed questions of law and fact and to extend *Teague* to where this Court had declined to extend it in *West*.[20]

3. "An unreasonable application of" this Court's precedents focuses on the objective reasonableness of the state court's application of law to fact.

Williams illogically asserts that under § 2254(d)(1), state court applications of clearly established general rules that provide a framework for analyzing a particular type of generic claim must be reviewed de novo. He conveniently concludes that the rule established by this Court in *Strickland* for assessing ineffective counsel claims is just such a rule, and should be reviewed without any deference to the state court's decision. Such rules of general application, however, simply cannot be deemed to compel a particular result in every factual situation no matter how different from the facts in the case that established the normative rule. The standard of review this Court established in *Strickland* constitutes the "clearly established precedent" which state courts are compelled to apply, and a state court decision that fails to apply

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(Mar. 14, 1996) (statement of Rep. Chenoweth, opposed); *id.* at 2249 (statement of Rep. Hyde, in favor).

[20] *West* was discussed by the opponents of § 2254(d) who acknowledged that the proposed statute expressly contemplated deference to reasonable state court decisions applying federal law. *See* 141 Cong. Rec. S7843-S7844 (June 7, 1995) (statement of Sen. Biden); 142 Cong. Rec. S3440 (April 17, 1996) (statement of Sen. Moynihan).

Strickland to an ineffective counsel claim would be "contrary to" precedent. But a state court's application of the *Strickland* standard to the particular facts of a state prisoner's case is a matter that § 2254(d)(1) limits solely to a review for "unreasonableness."[21]

"Applications of clearly established Federal law" plainly means the state court's adjudication of mixed questions of law and fact. *See Thompson v. Keohane*, 516 U.S. 99, 112-113 (1995) (application of controlling legal standard to historical facts is mixed question); *Townsend v. Sain*, 372 U.S. at 309 n.6 ("mixed questions of fact and law . . . require the application of a legal standard to the historical fact determinations"); *Brown v. Allen*, 344 U.S. at 507 (Frankfurter, J., concurring) ("so-called mixed questions or the application of constitutional principles to the facts as found").[22] "Reasonableness" in the context of § 2254(d), as in the contexts of *Teague* and the qualified immunity cases, is an objective standard. *See O'Dell*, 521 U.S. at 156; *Stringer*, 503 U.S. at 237; *Wilson*, 119 S.Ct. at 1699. This Court, moreover, has defined "objective reasonableness" in terms of whether "a reasonable jurist"

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[21] Indeed, it would be impossible to conclude that the facts of a particular case were sufficiently similar to the facts in *Strickland* that a state court decision denying relief was "contrary to" *Strickland*. As this Court ruled in *Strickland*, the facts in that case did ***not*** warrant federal collateral relief. The lower federal courts consistently have reviewed *Strickland* claims for "unreasonable applications." *See, e.g., Vieux v. Pepe*, 1999 U.S. App. LEXIS 16656, *11 (1st Cir. 7/19/99); *Ashford v. Gilmore*, 167 F.3d 1130, 1134 (7th Cir. 1999); *Neeley*, 138 F.3d at 925.

[22] In the qualified immunity context, "reasonableness" under "clearly established" law requires review of the particular conduct of the state official. *See Wilson*, 119 S.Ct. at 1699-1701.

would have felt compelled by existing precedent to rule in the prisoner's favor. *See Graham*, 506 U.S. at 467; *Saffle*, 494 U.S. at 488; *see also Wilson*, 119 S.Ct. at 1699 ("objective reasonableness" in qualified immunity context defined as whether reasonable officer would understand that conduct violates "clearly established" right).

The analysis conducted by the Fourth Circuit in Williams' case – "whether reasonable jurists would all agree" that the state court's rejection of his ineffective counsel claim was "unreasonable" (JA 498) – is faithful, not only to the language of § 2254(d)(1), but also to the "objective reasonableness" standard of *Teague* and the qualified immunity cases. Williams' assertion that the standard is "self-nullifying" (Pet. Br. 44) is nonsense. Neither this Court, the Fourth Circuit nor the Warden ever has suggested that the mere existence of the state court decision denying relief is evidence of its reasonableness. *See Stringer*, 503 U.S. at 237.

D. The Fourth Circuit correctly applied § 2254(d) in Williams' case.

The Fourth Circuit rejected Williams' claim that his trial counsel were ineffective in failing to offer certain mitigating evidence, finding that the Virginia Supreme Court "reasonably applied clearly established law, as determined by the Supreme Court of the United States." (JA 508). The Court of Appeals applied § 2254(d) in the following manner:

> We recently interpreted subsection (1) to prohibit the issuance of the writ unless (a) the state court decision is in "square conflict" with Supreme Court precedent that is controlling as to law and fact or (b) if no such controlling decision exists, "the state court's resolution of a question of pure law rests upon an objectively

> unreasonable derivation of legal principles from the relevant [S]upreme [C]ourt precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts." "In other words, habeas relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable."

(JA 497-498) (citations omitted). As demonstrated above, this interpretation of § 2254(d)(1) is faithful to both the language of the statute and Congress' intent to limit federal collateral review of claims which the state courts reasonably have rejected on the merits.

The Court of Appeals, moreover, not only upheld the reasonableness of the state court decision in Williams' case, it also independently concluded that his claim was without merit: "Like the Virginia Supreme Court, we readily conclude that Williams was not prejudiced in any way by counsel's actions." (JA 505). Thus, even under a de novo review of Williams' claim, the Fourth Circuit found that Williams had failed to demonstrate a reasonable probability that the jury would have imposed a life sentence if trial counsel had presented the evidence in question. Therefore, even if Williams' interpretation of the statute were correct, or even if the new statute never had been enacted, his ineffective counsel claim would fail under a de novo standard of review.

II. THE COURT BELOW CORRECTLY UPHELD THE STATE COURT'S REASONABLE APPLICATION OF *STRICKLAND v. WASHINGTON* AND *LOCKHART v. FRETWELL*.

Williams argues that the Fourth Circuit erred in upholding the state court's decision because the Virginia

Supreme Court concluded that he had failed to demonstrate prejudice as described in *Lockhart v. Fretwell in addition to* failing to satisfy the prejudice inquiry set out in *Strickland*. He also asserts that he has established *Strickland* prejudice, at least in terms of the hypothetical effect that his proffered mitigation evidence supposedly would have had on "one juror." The Fourth Circuit, however, correctly found that the state court reasonably concluded that Williams had failed to demonstrate a "reasonable probability of a different result" as required by *Strickland, and* that he failed to show that his trial was rendered fundamentally unfair or unreliable as a result of counsel's errors. Williams' "one juror" argument properly was rejected by the Court of Appeals because it misconceives *Strickland*'s concept of prejudice.

A. The Fourth Circuit and Virginia Supreme Court correctly identified the relevant "clearly established Federal law, as determined by the Supreme Court of the United States."

It cannot be disputed that *Strickland* and *Fretwell both* form part of this Court's clearly established precedent governing ineffective counsel claims. In *Strickland,* this Court announced the now familiar two-part standard by which such claims are measured. A prisoner must demonstrate both that his counsel's performance fell below an objective standard of reasonableness, *see* 466 U.S. at 688, *and* that he has been prejudiced by counsel's conduct. *Id.* at 694. *Strickland* also made clear that in order to show prejudice, a prisoner must demonstrate "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. To carry that burden the prisoner must "show that there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In *Fretwell*, the Court merely restated the general Sixth Amendment principle that a showing of *Strickland* prejudice must implicate the reliability of the prisoner's trial. Fretwell had been convicted of capital murder and sentenced to death in 1985. Fretwell's trial counsel failed to object to the use of a particular statutory aggravator, an objection that the lower federal courts concluded would have prevented his death sentence under Eighth Circuit precedent existing at the time of trial, but which had been overruled by the time of the federal habeas proceeding. Fretwell claimed that trial counsel's error was prejudicial because the objection, if made at the time of trial, ultimately would have caused a different result. The district court and Eighth Circuit agreed with Fretwell and granted relief.

This Court reversed, rejecting the lower federal courts' strict outcome-based reading of *Strickland*:

> [A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

Fretwell, 506 U.S. at 369-370. Because he was denied only "the chance to have the state court make an error in his favor," Fretwell's sentencing was neither unfair nor unreliable. *Id.* at 371. "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Id.* at 372.

Williams argues that *Fretwell* created a limited rule applicable only if the defendant asserts the denial of a right which the law does not recognize. He relies on Justice O'Connor's concurring opinion which would have limited the Court's holding to such an "unusual" case. *Id.* at 375 (O'Connor, J., concurring). The majority opinion, however, did not purport to define an exception to the *Strickland* prejudice inquiry. Rather, the Court merely clarified and applied the same Sixth Amendment focus upon reliability that from the outset has informed *Strickland*'s "prejudice" requirement.[23]

Strickland itself explicitly recognizes this fundamental principle. It requires that a prisoner demonstrate prejudice by showing "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687. In formulating the appropriate test for prejudice, the Court expressly considered how to assess the impact of counsel's errors on the fairness of the proceeding and the reliability of the result. *Id.* at 693 (rejecting "some conceivable effect" standard because not every error undermines reliability); *id.* at 694 (rejecting "more likely than not" standard because result

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[23] As *Fretwell* makes clear, assessing prejudice by reference to the effect of counsel's errors on the fairness and reliability of the trial is inherent in the Sixth Amendment. "Our decisions have emphasized that the Sixth Amendment right to counsel exists 'in order to protect the fundamental right to a fair trial.' " *Fretwell*, 506 U.S. at 368, *quoting Strickland*, 466 U.S. at 684. *See also Nix v. Whiteside*, 475 U.S. 157, 175 (1986) ("fairness of adversary proceeding" is "benchmark" of right to counsel); *United States v. Cronic*, 466 U.S. 648, 658 (1984) (Sixth Amendment not implicated without effect of conduct on reliability of trial); *United States v. Morrison*, 449 U.S. 361, 364 (1981) (right to counsel "meant to insure fairness" in criminal proceeding).

of proceeding can be unreliable, and proceeding itself unfair, even if outcome cannot be shown to have been affected). The Court concluded that the appropriate standard, borrowed from the test for materiality of undisclosed exculpatory information, requires a showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*[24] The "reasonable probability" inquiry does not supplant the overriding requirement that counsel's errors be shown to have affected the fairness of the trial and the reliability of the result. Indeed, after rejecting the prisoner's claims, *Strickland*'s concluding lines recite that "[m]ore generally" the prisoner had not shown "that the justice of his sentence was rendered unreliable" and that his sentencing was not "fundamentally unfair." *Id.* at 700.[25]

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[24] The fairness and reliability of the proceedings also is the concern underlying the materiality standard that the Court borrowed for use in *Strickland*. *See United States v. Agurs*, 427 U.S. 97, 108 (1976) (prosecutor's constitutional duty not violated unless omission in producing information denied the defendant a fair trial); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872-873 (1982) (materiality rule designed to protect "fundamental fairness essential to the very concept of justice").

[25] Justice O'Connor's observation in her *Fretwell* concurrence that the Court's specific holding will not affect the prejudice inquiry under *Strickland* in the "vast majority of cases," *see Fretwell*, 506 U.S. at 373 (O'Connor, J., concurring), is undeniably accurate. Indeed, it did not affect the Virginia Supreme Court's explicit finding that Williams had failed to demonstrate prejudice under *Strickland*. The *Strickland* prejudice inquiry was designed for general application in cases where prejudice could not be presumed. *See Strickland*, 466 U.S. at 693. *Fretwell* is a reminder, however, that *Strickland*'s prejudice inquiry must always be grounded on the effect of counsel's alleged error on the fairness of the trial or the reliability of the result.

B. The Virginia Supreme Court did not characterize Williams' claim as seeking a "windfall," but correctly recognized that the Sixth Amendment does not protect a defendant's "right" to a malfunction of the trial process.

Williams argues that the Virginia Supreme Court's mere reference to the word "windfall" must mean that the state court somehow determined that Williams had "no right to submit the neglected mitigation evidence." (Pet. Br. at 21). Williams' argument, however, is premised entirely on his misreading of the state court opinion. The Virginia Supreme Court's references to *Fretwell* do not even remotely suggest that Williams was not entitled to present mitigating evidence or that he had satisfied the *Strickland* prejudice inquiry.[26]

It is true, of course, that the word "windfall" appears once in the Virginia Supreme Court's opinion, within a preliminary summary of the applicable law. (JA 438). Williams ignores, however, what the Virginia Supreme

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[26] The Virginia Supreme Court consistently has applied *Strickland* as the standard for ineffective counsel claims since 1984. *Virginia Department of Corrections v. Clark*, 318 S.E.2d 399, 403-404 (Va. 1984). *See Pender v. Angelone*, 514 S.E.2d 756, 757 (Va. 1999); *Curo v. Becker*, 493 S.E.2d 368, 370 (Va. 1997); *Strickler v. Murray*, 452 S.E.2d 648, 651 (Va. 1995); *Murray v. Griffith*, 416 S.E.2d 219, 221 (Va. 1992); *Bowles v. Nance*, 374 S.E.2d 19, 20 (Va. 1988); *Epperly v. Booker*, 366 S.E.2d 62, 67 (Va. 1988); *Correll v. Commonwealth*, 352 S.E.2d 352, 361 (Va. 1987); *Frye v. Commonwealth*, 345 S.E.2d 267, 287 (Va. 1986). In *Pender*, decided after Williams' case, the state court mentioned *Fretwell* solely in the context of emphasizing the interests of fairness and reliability which underlie the concept of *Strickland* prejudice, without any mention of a "windfall." *See Pender*, 514 S.E.2d at 757.

Court expressly concluded in the remainder of its opinion. The state court analyzed Williams' claim under the *Strickland* prejudice inquiry and clearly and repeatedly stated its conclusion that Williams had failed to establish "a reasonable probability of a different result." (JA 441, 443, 444). This express determination that Williams had failed to satisfy *Strickland*'s prejudice standard precludes any possibility that the state court applied the wrong standard. To the contrary, the Virginia Supreme Court correctly rejected the state habeas judge's erroneous "per se prejudice" approach, which mistakenly had concluded that, if mitigating evidence exists and is not offered into evidence, "this amounts to prejudice." (JA 444). Indeed, *Strickland* clearly prohibits a finding of prejudice based solely on the fact that evidence existed and was not presented. 466 U.S. at 700.

The state court also correctly criticized Williams' assertion that he could demonstrate prejudice merely by showing a reasonable probability that at least "one juror" considering his proffered mitigation evidence would have been persuaded to "hold-out" for a life sentence, thereby deadlocking the jury and ultimately resulting in a life sentence by default.[27] (JA 441). As demonstrated below (Argument II C), Williams' Sixth Amendment right to the effective assistance of counsel does not encompass a supposed "right" to a non-decision or to any other

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[27] The state court's rejection of Williams' "one juror" claim, however, never suggested that Williams had established a "reasonable probability" of a different outcome. Indeed, the very next paragraph of the Virginia Supreme Court's opinion concludes that Williams had not made that showing, and therefore had failed to satisfy the *Strickland* prejudice requirement. (JA 441).

similar malfunction of the trial process. The state court's reliance on *Fretwell*, therefore, was entirely appropriate.

That the Virginia Supreme Court applied *Fretwell in addition to Strickland*'s prejudice inquiry certainly does not entitle Williams to collateral relief. The state court's reliance upon *Fretwell* is entirely consistent with the *Strickland* standard which the Virginia Supreme Court accurately stated and correctly applied to Williams' claim.[28]

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[28] Decisions from every federal circuit, like that of the Virginia Supreme Court, have treated *Fretwell*'s emphasis on reliability and a fair trial as a mere explanation or clarification of *Strickland* prejudice. *See Scarpa v. Dubois*, 38 F.3d 1, 16 (1st Cir. 1994) ("We caution, however, that the analysis does not focus solely on outcome determination, but also takes into prominent consideration 'whether the result of the proceeding was fundamentally unfair or unreliable.' "), *cert. denied*, 513 U.S. 1129 (1995); *Carey v. United States*, 50 F.3d 1097, 1101 (1st Cir. 1995) ("Prejudice incorporates more than outcome determination; we also must determine whether 'the result of the proceeding was fundamentally unfair or unreliable' "); *United States v. Prince*, 110 F.3d 921, 925 (2d Cir.) (quoting *Fretwell*, "analysis focusing solely on mere outcome determination . . . is defective"), *cert. denied*, 522 U.S. 872 (1997); *Flamer v. Delaware*, 68 F.3d 710, 728 (3d Cir. 1995) (*Fretwell*'s fundamentally unfair or unreliable standard "clarified the meaning of prejudice under *Strickland*"), *cert. denied*, 516 U.S. 1088 (1996); *Westley v. Johnson*, 83 F.3d 714, 719 (5th Cir. 1996) (in *Fretwell*, "the Supreme Court further narrowed the prejudice inquiry"), *cert. denied*, 519 U.S. 1094 (1997); *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996) ("Notwithstanding the outcome-determinative focus in *Strickland*, the Court in *Lockhart* . . . clarified that 'an analysis focusing on mere outcome determination . . . is defective.' "), *cert. denied*, 520 U.S. 1257 (1997); *Durrive v. United States*, 4 F.3d 548, 550 (7th Cir. 1993) (*Fretwell*'s rejection of "mere outcome determination" was rejection of "equation between causation and prejudice.");

C. The Fourth Circuit correctly rejected Williams' "one juror" prejudice standard.

Virginia law provides that "[i]n the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life." Va. Code § 19.2-264.4(E).[29] Williams argues that a reasonable probability of a different sentencing result can be established by showing that at least "one juror" would have held out for a life sentence, thus deadlocking the jury and resulting in a life sentence by operation of law. The

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Whitmore v. Lockhart, 8 F.3d 614, 622 (8th Cir. 1993) (quoting *Fretwell*, "an analysis focusing on mere outcome determination . . . is defective"); *United States v. Palomba*, 31 F.3d 1456, 1461 (9th Cir. 1994) ("Under the Court's recent explication of *Strickland*'s second prong, a prejudice analysis 'focusing solely on mere outcome determination . . . is defective.' "); *United States v. Kissick*, 69 F.3d 1048, 1055 (10th Cir. 1995) ("[A] court may not set aside a conviction or a sentence solely because the outcome would have been different absent counsel's deficient performance. Instead, . . . a defendant must demonstrate that counsel's performance rendered the proceeding "fundamentally unfair or unreliable."); *Hayes v. Alabama*, 85 F.3d 1492, 1496 (11th Cir. 1996) ("Hayes must 'show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' "), *cert. denied*, 520 U.S. 1123 (1997). This unanimous understanding of *Fretwell* among the lower federal courts establishes the "objective reasonableness" of the Virginia Supreme Court's decision.

[29] The overwhelming majority of States with capital punishment follow the same practice. *See Jones v. United States*, 119 S.Ct. 2090, 2116-2117 (1999) (Ginsburg, J., dissenting) (citing report indicating that 25 states follow rule that jury's inability to agree on penalty produces life sentence). Of course, the rule Williams proposes cannot be limited solely to capital sentencings. *See Strickland*, 466 U.S. at 695 (same prejudice rule applies in capital and non-capital cases). It would apply with the same force when unanimity is required for **any** jury verdict.

assertion that *Strickland* prejudice can be demonstrated by speculating on the potential effect of omitted mitigation evidence on "one juror," however, misconceives the *Strickland* prejudice standard and indeed would replace *Strickland*'s stringent test with an inappropriately weak and unmanageable standard.

Strickland focuses on the *decision* of a trier of fact, either as to guilt or as to sentence. This Court never has suggested that the *Strickland* prejudice inquiry properly assesses the possibility of a jury's failure to decide, or that the Sixth Amendment right to effective counsel protects a defendant's "right" to a hung jury. *See United States v. Sawyers*, 423 F.2d 1335, 1341 (4th Cir. 1970) ("A defendant has no 'right' to either an irrational verdict or a hung jury. . . . When a defendant occasionally benefits, if he does, from a hung jury, he is getting not what he is entitled to have but something less."). As this Court recently has reaffirmed, "the very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Jones v. United States*, 119 S.Ct. at 2099, *quoting Allen v. United States*, 164 U.S. 492, 501 (1896). The Court rejected any requirement that a jury be instructed as to the consequences of a failure to decide because it "might well have the effect of undermining" the strong interest in "having the jury express the conscience of the community on the ultimate question of life or death." *Jones*, 119 S.Ct. at 2099, *quoting Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988).

The *Strickland* standard of prejudice thus protects a defendant's Sixth Amendment right to a fair and reliable ***decision*** by the factfinder, as well as the parties' interest in a reliable ***verdict***, by requiring that the prisoner must show the reasonable probability of a different *decision* but for counsel's alleged errors:

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, *the factfinder* would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one in this case, the question is whether there is a reasonable probability that, absent the errors, *the sentencer – including an appellate court to the extent it independently reweighs the evidence* – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

466 U.S. at 695. *See also Strickler v. Greene*, 119 S.Ct. 1936, 1955 (1999) (in *Brady* context, prisoner had not shown "reasonable probability that the jury would have returned a different verdict"); *Kyles v. Whitley*, 514 U.S. 419, 453 (1995) (the prejudice question asks "whether we can be confident that the jury's verdict would have been the same"); *United States v. Bagley*, 473 U.S. 667, 682 n.13 (1985) ("a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

Strickland's prejudice analysis, moreover, does not contemplate a spectrum of jurors each applying his or her own individual propensities for harshness or leniency. To the contrary, the Court made clear that the inquiry into the effect of errors by a prisoner's own counsel demands a completely objective assessment:

> The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decision maker, such as unusual propensities toward harshness or leniency.

466 U.S. at 695. Williams argues that he seeks only the "usual" variations that might appear on a given jury.[30] (Pet. Br. at 23). But an assumption that any jury necessarily includes at least "one juror" who is more predisposed to leniency simply invites reviewing courts to assess *Strickland* prejudice based on considerations having no proper place in an objective analysis.[31]

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[30] Williams mistakenly relies on decisions in contexts far different from the type of review involved in the *Strickland* prejudice inquiry. In *Adams v. Texas*, 448 U.S. 38, 46 (1980), this Court observed that jurors "exercise a range of judgment and discretion," but did so only in the context of considering whether Texas violated the rule in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), by excluding particular jurors who said they would be "affected" in their deliberations by the possibility of the death penalty. Similarly, in *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990), the Court ruled that the principle that a sentencer may not be precluded from giving effect to all mitigating evidence was violated by instructions and verdict forms that required unanimity before particular mitigation factors could be considered. That Eighth Amendment principle, however, simply has nothing to do with *Strickland*'s Sixth Amendment inquiry regarding whether a petitioner is entitled to relief on the basis of his trial counsel's alleged errors absent evidence that the errors had an adverse impact on the collective decision reached by the jury. *See McKoy*, 494 U.S. at 450 n.5 (Blackmun, J., concurring) (drawing distinction between situation where lack of unanimity prevents any juror from considering evidence thought to be "mitigating" and situation where lack of unanimity merely results in hung jury).

[31] The contrary rule that Williams would have this Court adopt is unworkably imprecise. He offers no explanation as to how a reviewing court would divine the views of the most sympathetic juror, or how to assess whether there is a reasonable probability that such presumed sympathetic tendencies might cause the hypothetical juror to choose to "hold-out" and prevent a decision by the jury. As Williams has

In *Harrington v. California*, 395 U.S. 250 (1969), the Court expressly rejected a harmless error analysis premised on the same assumption Williams makes – that some, or even one, juror can be persuaded more easily than his colleagues:

> It is argued that we must reverse if we can imagine a single juror whose mind might have been made up because of Cooper's and Bosby's confessions and who otherwise would have remained in doubt and unconvinced. We of course do not know the jurors who sat. Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the minds of an average *jury*.

395 U.S. at 254 (emphasis added). *See also Boyde v. California*, 494 U.S. 370, 380 (1990) ("reasonable likelihood" standard for assessing how jury interpreted instruction "better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical reasonable juror could or might have interpreted the instruction. . . . Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way lawyers might."). This reasoning applies with at least equal force in the context of *Strickland*'s inquiry regarding whether a petitioner has been prejudiced by his trial counsel's alleged errors.

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acknowledged, *Strickland* was meant to establish an "administrable standard." (Pet. Br. at 20). Williams' "rule" would provide no standard at all.

D. The Fourth Circuit correctly upheld the Virginia Supreme Court's reasonable application of Strickland v. Washington.

Williams insists that his case should have been considered under *Strickland* only, but makes no plausible argument that the Virginia Supreme Court's references to *Fretwell, in addition to* the express disposition of his claim under the *Strickland* prejudice standard, constitutes the type of fundamental error contemplated by § 2254(d)(1). Obviously, the state court's express finding that Williams had failed to demonstrate a reasonable probability of a different result (JA 441) was in no sense rendered "unreasonable" by the fact that the state court also generally concluded that Williams' trial was fair or his sentence reliable.

Given the evidence concerning the circumstances of Williams' crime and his record of other violent criminal activity, the evidence that his trial attorneys failed to present "would barely have altered the sentencing profile presented to the [jury]." *See Strickland*, 466 U.S. at 700. At the time of the capital crime, Williams was "in the midst of a crime spree, preying upon defenseless individuals." (JA 442). Within four months after the Stone murder in November 1985, Williams stabbed and robbed an elderly man in his home, after starting a fire on the victim's porch to lure him outside, and savagely beat an elderly woman causing brain injuries that left her in a "vegetative state" with no hope of recovery.

Williams' optimistic argument that he has presented a compelling case of mitigating evidence simply will not survive scrutiny. Williams stresses the circumstances of his upbringing and evidence of abuse and neglect, some of it dating back thirty years, as evidence that could have

been offered to provide the jury with "a basis for affording him compassion." Williams, however, was not a child, but a thirty-one-year-old man when he murdered Mr. Stone, and his lack of compassion for his array of elderly victims was abundantly evident in the case presented at sentencing. Indeed, Williams' own court-appointed psychiatrist, who was aware that Williams had had a "difficult childhood," considered such evidence to be a "two-way sword" that just as easily could be used "as an argument for non-mitigation." (JA 261, 277). Indeed, this Court has recognized that such evidence can work to the defendant's disadvantage, *see Penry*, 492 U.S. at 324 ("Penry's mental retardation and history of abuse is . . . a two-edged sword. . . . "), and it undoubtedly would have if it had been presented at Williams' trial. At a bare minimum, evidence of Williams' upbringing would have prompted the prosecution to present the records of Williams' extensive juvenile criminal conduct and repeated incarcerations. The Virginia Supreme Court noted fourteen juvenile offenses committed by Williams from 1966 to 1975 that were not presented to the jury, and clearly such additional proof of Williams' lifelong criminal career would have been harmful to his case. (JA 442-443).

Williams claims the omitted evidence would have demonstrated that he would not be violent in prison if incarcerated for life, relying on prison records and testimony of prison guards attesting to his good behavior during prior incarcerations, and the opinions of the Commonwealth's experts.[32] The evidence already before the

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[32] Williams' assertion that his potential dangerousness in prison provided the "key to the Commonwealth's theory for death" is entirely wrong. Williams' counsel argued that the defendant would be "locked up for the rest of his life." (JA 138).

jury, however, established that, since his prior incarceration, Williams had assaulted, stabbed, robbed and killed, he had set a fire while in jail awaiting trial, and had expressed his urges to choke or hit other prisoners in the jail. (JA 81). Moreover, the state habeas judge did not credit or cite the expert opinions as persuasive mitigating evidence, and elsewhere concluded that the evidence of Williams' criminal history "alone was more than sufficient to support" the jury's future dangerousness finding.[33] (JA 426).

The state habeas judge found the testimony of Williams' ex-wife, daughter and a friend, Bruce Elliott, to be the only proffered character evidence "worthy of a jury's consideration."[34] (JA 423). The same state habeas judge, however, properly credited defense counsel's deliberate strategy decision to forego additional character witnesses

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Williams would have been eligible for parole on a life sentence in "about twelve and a half years." (JA 138). Despite the invitation presented by defense counsel's misleading argument, the prosecutor never suggested that a death sentence was warranted because of Williams' dangerousness in prison. He argued only Williams' demonstrated dangerousness to society in general. (JA 143-149).

[33] Williams not only continues to rely on expert opinions which the state habeas judge never accepted or relied upon, he also asserts evidence concerning the effects of "prenatal alcohol exposure" which the state court expressly found that Williams had **not** established. (JA 387). Williams cannot overcome the state court's findings. *See* § 2254(e)(1) (state court factual findings must be presumed correct and may be overcome only by "clear and convincing evidence").

[34] The state habeas judge inaccurately referred to the "testimony" of Williams' friend Bruce Elliott as the "most persuasive mitigating evidence" (JA 400), despite the fact that Elliott's "testimony" consists only of his affidavit, which never was subjected to cross examination. (JA 563-566).

because of the devastating effect of the prosecutor's cross-examination of the two character witnesses who *did* testify, but thought more evidence should have been offered "for whatever it was worth." (JA 401). The Virginia Supreme Court reasonably found that the proffered testimony of the witnesses showed, at most, that Williams was viewed as non-violent by his family and friends, an assumption that was "belied by the four month crime spree," and that the proffered mitigating evidence "barely would have altered the profile of this defendant," and "might even have been harmful to his case." (JA 443). The Fourth Circuit agreed with the Virginia Supreme Court's *Strickland* analysis that the unaffected evidence of Williams' dangerousness was "simply overwhelming," and that the evidence as a whole "painted Williams as a recidivist who was likely to commit future offenses." (JA 505). The Court of Appeals thus concluded that the state court decision rejecting Williams' claim was not unreasonable. (JA 505-506). The rejection of Williams' claim under the *Strickland* prejudice standard by both a unanimous Virginia Supreme Court and a unanimous Fourth Circuit clearly represents a reasonable application of this Court's precedent.

E. Defense counsel performed within the range of reasonable professional competence.

Because the Virginia Supreme Court and the Fourth Circuit both concluded that Williams' claims failed to meet *Strickland*'s prejudice requirement, neither court reached the performance prong of the governing two-part standard. *See Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack

of sufficient prejudice . . . that course should be followed."). Both courts simply "assumed without deciding" that Williams had established the performance prong. (JA 439, 443, 501). That assumption, however, should not be misconstrued as a finding of deficient performance.

Assessing counsel's performance from the circumstances presented at the time of trial, *see Strickland*, 466 U.S. at 689, counsel did not act unreasonably in failing to discover or present the evidence that Williams later proffered during the state collateral proceeding.[35] In *Strickland*, this Court found defense counsel effective in circumstances certainly more "egregious" than those presented here. *See* 466 U.S. at 672-674. *See also Burger v. Kemp*, 483 U.S. 776, 795 (1987) (counsel reasonably determined not to present any mitigation evidence).

Thus, Williams' failure, much like that of the prisoner in *Strickland*, is a "double failure," 466 U.S. at 700, and therefore he is not entitled to relief.

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[35] Counsel reasonably sought information from Williams' family members, but they never suggested that any helpful evidence existed concerning Williams' upbringing. (JA 208, 227, 235). They presented character evidence to show that Williams had some redeeming qualities, *and the state habeas judge expressly found that counsel made a tactical decision not to call additional witnesses*. (JA 400). The state court also found that counsel were reasonable in their strategy of avoiding having their psychiatric expert testify that Williams is dangerous and in asking the jury to spare Williams because he had turned himself in to the authorities and confessed. (JA 406, 408).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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IN THE
Supreme Court of the United States

TERRY WILLIAMS,
Petitioner,

v.

JOHN B. TAYLOR, WARDEN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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I. *STRICKLAND* COMPELS RELIEF IN THIS CASE

A. Trial Counsel's Failings Were Prejudicial Under *Strickland*

Unable to deny that Williams' counsel failed completely to develop and present substantial mitigation evidence,[1] Virginia shrugs that evidence off as useless. It dismisses the abuse and neglect Williams *undisputedly* suffered as a child by arguing that, since Williams was no child when the murder occurred, the Court can ignore his upbringing. RB 46. This argument disregards everything the Court has said about the importance of early life, particularly childhood abuse, in capital sentencing. *See* POB 15, 21; ABA Br. 15-16.[2]

In further disparagement of the evidence—and contradicting its claim that Williams' childhood experiences were irrelevant to his adult behavior—Virginia asserts that "evidence of Williams' upbringing would have prompted the prosecution to present the records of Williams' extensive juvenile criminal conduct and repeated incarcerations," evidence "harmful to his case." RB 46.[3]

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[1] Virginia does contend that counsel's failures fell short of unprofessional performance. It has not persuaded *any* court of this. The emptiness of its position is revealed by its attempt to blame Williams' family for the undeveloped mitigation, RB 8, n.4; 49 n.35, suggesting that Williams' mother should have understood counsel's "shotgun" request for "anything that would help Terry," JA 227, as requiring her to relate her own and her husband's alcoholism and imprisonment for child neglect and her husband's brutal beatings of her son. Mrs. Williams was not her son's lawyer. If his lawyer never drew her attention to these areas of mitigation, JA 194-97, why would they occur to an uneducated layperson?

[2] Sensing the weakness of this argument, Virginia tries to rehabilitate Williams' father, RB 7, citing his alleged "great concern" for the family. It defies plausibility, however, that a jury would have credited this over the undisputed accounts of Williams' siblings that Williams was the target of his father's abuse throughout his childhood. JA 329-34, 576-85.

[3] Virginia notes that "[t]he state habeas judge expressly found that counsel made a tactical decision to avoid additional character

But Williams' juvenile record added nothing harmful to his adult record which the prosecution used in aggravation; and it is likely that a juror would have seen that Williams' petty crimes beginning at an early age (stealing lunchmeat from a neighbor's refrigerator at age 11 or pulling a fire alarm at age 12, JA 531, 533) were best understood in the light of the omitted mitigation evidence —that Williams was a pathetic, deprived child whose only refuge from abuse and neglect was the relative safety of the state boys' home. JA 528-33, 539, 542-46.[4]

Dismissing Williams' evidence of positive conduct in a controlled environment, Virginia argues that the state circuit court did not rely on such evidence. RB 47 & n.33. But the Danville court specifically included in its recitation of the omitted mitigation evidence that "petitioner's conduct had been good in certain structured settings in his life (such as when he was incarcerated)"; and its reference to *Kubat v. Thieret*, 867 F.2d 351, 369 (1989) (testimony of law enforcement officer can make difference between life and death), shows its reliance on this factor, JA 423. The undisputed opinions of the state's own psychiatric witnesses that Williams would not be a future danger in a controlled environment are consistent

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witnesses and thereby deny the Commonwealth additional opportunities to reemphasize Williams' criminal record." RB 9, 49 n.35. But counsel's decision not to present more *ineffectual* testimony that Williams was "a nice boy" scarcely excuses his failure to introduce *effectual* evidence on *issues that mattered* (Williams' childhood abuse and neglect; his adjustment in a structured environment)—the kinds of evidence that counsel later admitted he would have used if he had known of it, JA 196, and that two experienced trial judges found would have made a difference.

[4] Virginia contends that the affidavits adduced on this and other points are discredited for lack of cross-examination. RB 6-7 n.3, 47 n.34. The affidavits were introduced without objection by Virginia, which could have made a point of the form of the presentation—or could have called the affiants—if it thought cross-examination useful. In federal habeas, of course, affidavits are a mainstay of factfinding, explicitly sanctioned by 28 U.S.C. § 2246.

with the court's finding that Williams' positive record in prison should have been presented to the jury and that this and other "crucial" mitigation evidence, JA 423, would have made a difference.[5] Here, as in *Skipper v. South Carolina*, 476 U.S. 1 (1986), what was involved was not merely mitigation evidence—important as that is—but evidence rebutting the prosecution's sole statutory *aggragating* factor of future dangerousness.[6]

Finally, Virginia focuses the Court's attention on *one* incident in the city jail when Williams set a match to his bedsheets, and on his random *thoughts*, told to a detective, about his *unacted-on* urge to choke a fellow inmate. RB 47. However convincing this prognosticative evidence may have been to a jury which was *not* given all the information based on Williams' actual behavior in confinement that his lawyer neglected—prison commendations; testimony of correctional officials; opinions of the state's own psychiatric witnesses that Williams would *not* be a danger in prison, POB 6-7—it cannot pass muster as a basis for supposing that counsel's neglect of this wealth of information was nonprejudicial.

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[5] Virginia's criticism of the state circuit court's *Strickland* analysis as a flawed "per se" test, RB 38, misreads that court's decision. The Danville court correctly stated the applicable legal rules for assessing prejudice, JA 416-17; it then correctly applied that law by evaluating the omitted mitigation evidence *in light of* the evidence actually presented at trial—including the hard facts of Williams' "crime spree," RB 45, quoting JA 442—to determine whether the omission was reasonably likely to "have altered the sentencing profile presented" to the jury, *Strickland*, 466 U.S. at 700. *See* JA 401 ("[w]ith so little favorable testimony in the way of mitigation and faced with much unfavorable evidence on the question of future dangerousness, this information could have been critical in the jury's decision as to Williams' punishment").

[6] Contrary to Virginia's claim, it is plain that the key to its theory for death was Williams' behavior in prison. That is where Williams would have been if he had received a life sentence. The prosecutor did not—and believed he could not, JA 138—argue to the jury Virginia's present speculations about Williams' prospects for parole, RB 46-47 n.32.

B. Virginia's *Fretwell* Analysis Is Incorrect

By making *Fretwell's* "fundamental fairness and reliability" test subsume *Strickland's* outcome-determinative standard in a non-"windfall" situation where *Fretwell's* analysis is inapposite, the Virginia Supreme Court invoked and applied the wrong rule of law, an error that fatally flaws its decision. The State's attempted justification that *Fretwell* is "merely" a restatement of *Strickland*, RB 34, 35, is palpably at odds with the state-court decision it is offered to defend, which expressly rejected Williams' reliance on the *Strickland* standard as "defective," JA 141:

> The prisoner's discussion flies in the face of the Supreme Court's admonition in *Lockhart, supra*, that 'an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.'

Seemingly in the alternative, Virginia argues that its Supreme Court's reliance on *Fretwell* was "entirely appropriate" because the Sixth Amendment does not protect a defendant's "right" to a "malfunction of the trial process." RB 38-39. The predicate of this argument is that Williams seeks such a "malfunction" when he urges that the omitted mitigation evidence would likely have saved his life by persuading at least one juror to vote against death. Nowhere in its decision, though, did the Virginia Supreme Court *suggest* that a life sentence imposed by operation of law because one juror voted for life would be a "malfunction" of the trial process demanding correction under *Fretwell's* "windfall" analysis. The only "malfunction" the Virginia Supreme Court sought to correct was the possibility of a life sentence it believed too lenient.

C. State Law Itself Makes One Juror Decisive

More basically, Virginia's notion that what Williams seeks in this case is no decision at all—a "malfunction

of the trial process"—is nonsense. *Strickland* does not protect *only* "decisions by the factfinder" and "verdicts," RB 41. It expressly protects "results" and "outcomes," 466 U.S. at 685-87, 691, 693-97—words that clearly include a "result" produced by operation of law.

The key to *Strickland's* "reasonable probability" test is not the identity of the factfinder or sentencer but the "result" or "outcome" reasonably probable but for counsel's inadequacies. Under the "governing legal standard" in Virginia—which, as *Strickland* explains, "plays a critical role in defining the question to be asked in assessing . . . prejudice," 466 U.S. at 695—a verdict of death must be unanimous, or the trial results in a life sentence. Va. Code Ann. § 19.2-264.4(D), (E). Williams' focus on the probabilities inherent in a "result" or "outcome" that can shift from death to life if one juror changes his or her vote is the reflection of this "governing legal standard."[7] Virginia's contrary contention that the "result" directed by the Virginia statute is a "hung jury," an "irrational verdict," or no "decision" is simply a quarrel with the State's own legislative choice.

Worse, it is a quarrel with *Strickland's* chosen standard of prejudice.[8] For if the application of that standard cannot be based upon the likelihood that a single juror's

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[7] *See, e.g., Strickler v. Greene*, 119 S. Ct. 1936, 1961 (1999) (Souter and Kennedy, JJ., concurring and dissenting) ("one cannot be reasonably confident that not a single juror would have had a different perspective after an impeachment that would have destroyed the credibility" of the key prosecution witness); *Emerson v. Gramley*, 91 F.3d 898, 907 (7th Cir. 1996); *Mak v. Blodgett*, 970 F.2d 614, 620 (9th Cir. 1992).

[8] Virginia's claim that a *Strickland* prejudice analysis allowing for the variation of views among reasonable jurors, see POB 22-23 and *Adams v. Texas*, 488 U.S. 38 (1980), would be "unworkably imprecise," RB 43 n.31, is incomprehensible. *Every* standard for interpretation of 28 U.S.C. § 2254(d) proposed by *anybody* in this litigation requires that in some situations allowance be made for the variation of views among reasonable judges. Allowing for similar variation among jurors is no different.

refusal to vote for death would result in a life sentence by operation of law, then it must be satisfiable *only* by a showing that the entire jury would have turned around and voted *unanimously* to spare the defendant's life. But *that* conclusion would not be possible unless a reviewing court could say that *every* rational juror must have voted for life if counsel had done a professional job. And this is plainly *not* the meaning of the *Strickland* standard of prejudice, as this Court has held time and again. *E.g.*, *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995); *Strickler v. Greene*, 119 S. Ct. 1936, 1952 (1999).

Thus, Williams is entitled to relief unless § 2254(d) requires a federal habeas court to uphold a state-court decision that *both* contravenes *Strickland and* misinterprets *Fretwell* as modifying *Strickland's* settled rule. But § 2254(d) does not, as we now show.

II. RULES OF PRINCIPLED STATUTORY CONSTRUCTION THAT VIRGINIA FLOURISHES BUT FLOUTS REQUIRE WILLIAMS' READING OF § 2254(d)

Section 2254(d) bars habeas relief unless a state-court "decision . . . was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." Williams' opening brief shows that the statute's text, history and antecedents give an unambiguous meaning to these words, which explicitly adopt—with equally explicit amendments—the method devised by *Teague v. Lane* for accommodating deference to the state courts with a federal court's responsibility for determining federal law in cases within its jurisdiction. The core of the method is to preserve plenary, "contrary to" review of the "decision" of claims arising under "law" that this Court had "clearly established" to govern such claims before the state court acted, while assuring that when a state court is faced with a federal claim *not* governed by this Court's clearly estab-

lished law, its decision will not be upset except for "unreasonable application[s] of [the] law."

In enacting § 2254(d), Congress made three manifest changes in *Teague*: it limited review of state-court decisions to adjudications that are contrary to the law *this Court* (but not lower federal courts) had clearly established *before* the state court acted (but not during the later *certiorari* period), and it *eliminated the two exceptions Teague* had recognized to its rule against blindsiding state courts. With these adjustments, Congress resolved its long debate over federal habeas reform, using the familiar terms of the *Teague* doctrine to embody *Teague*'s familiar rule of deference.

Opposing this conclusion, Virginia's brief promises to give § 2254(d) an alternative "clear" construction based on the statute's language, history and antecedents. But it conspicuously fails to keep that promise. It neglects the statutory text and derives only useless platitudes from the legislative history, while disregarding every relevant canon of construction. In the end, it replaces Congress' chosen words with an incoherent tangle justified only by its own policy predilections and those it attributes to the Court. Here, we review these aspects of Virginia's brief, then show that its result is not supported by the interpretive tools it proposes (but never uses) or by the diverse circuit court interpretations; that its reading poses acute constitutional problems; and that the statutory text, history and canons all sustain the clear and functional *Teague*-based construction which Williams advances.[9]

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[9] Section 2254(d)'s meaning is crucial. The Court of Appeals' ruling that the District Court "erroneously granted" relief was reached as the "result" of its finding under § 2254(d) that the state-court "conclusion . . . was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent" based on its interpretation of those terms to require abjectly deferential "unreasonable application" review of Williams' ineffective assistance claims. JA 490, 498; *see* POB 42-44.

A. Virginia Ignores the Statute's Text, History and Antecedents and Makes It an Unworkable Hash

Virginia claims that "the *clear intent of Congress*, as expressed by the *plain meaning* of [§ 2254(d)'s] text," "the meaning of those terms *as used by this Court* in the context of federal collateral review" and "unambiguous *legislative history*, was to prohibit federal habeas relief when the state court reasonably identified and applied this Court's clearly established precedent." RB 12, 16. But Virginia fails—and never even tries—to ground its reading in § 2254(d)'s words, antecedents or history; instead, it concocts an incoherent construction serving only its "policy" preference "to prohibit federal habeas relief generally." RB 15.

1. *Virginia shuns every valid tool of construction*

The text gives Virginia no support. While claiming to invoke the "ordinary meaning of the terms Congress chose," Virginia ascribes a meaning to § 2254(d)'s terms that no normal reading could produce: "In enacting § 2254(d), Congress *generally prohibited* the granting of federal habeas corpus relief on the basis of a claim that the state court adjudicated on the merits," subject only "to narrow exceptions" reserving habeas "review" for "rare occasions." RB 14-16. Notably, *no* court yet has descried this "plain meaning" (*see* note 18 *infra*), nor do Virginia's *amici* (*see, e.g.*, CJLF Br. 25-26: § 2254(d) submits *all* habeas claims to detailed review). In fact, Virginia never examines the "plain meaning of the statute . . . as a whole," *K-mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); it relies solely on what the phrase "shall not be granted" in § 2254(d)'s preface allegedly "*evinces*," RB 19-20. Virginia devotes not a syllable to interpreting *any* of the remaining words of § 2254(d): "*unless* the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law," etc.

To read a "general prohibition" into what precedes Congress' "unless"—and then disregard what follows—is indefensible. First, the modern habeas statute has always used a "no-relief-*unless*" format. 28 U.S.C. § 2241(c)(3) ("The writ of habeas corpus *shall not extend* to a prisoner *unless* . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States." (emphasis added)). Yet the Court has always required careful review of habeas claims to see if the words following "unless" require relief. *E.g., Herrera v. Collins*, 506 U.S. 390 (1993). Second, Congress could not have meant § 2254(d) to bar habeas relief "generally" once state procedures purported to "determine[] the merits of a state prisoner's claims," RB 15, because Congress defeated an amendment aimed to do just that. 141 Cong. Rec. S7828, S7849 (June 7, 1995); *see* ACLU Br. 26. Third, the words Virginia ignores overtly *require* review of each "claim" to see whether the state-court conclusion affronted a settled rule this Court had designed to govern the claim (whether the "*decision* was *contrary* to clearly established . . . law," when there was such law) or whether the conclusion was based on a rule the state court unreasonably derived from the non-governing Supreme Court law (whether the "decision . . . involved an unreasonable application of clearly established . . . law" when there was *no* governing law). *See* POB 33-39.

Virginia's appeal to legislative history only begs the question. All Virginia finds in the debates (as in a dictum from *Lindh v. Murphy*, 521 U.S. 32 (1997) it often quotes) is a call for "deference" to state judgments. RB 11-12, 16, 19, 27-29. But under Williams' reading of the statute, it *is* highly deferential to state judgments. As he has shown, AEDPA sharply curtails federal habeas review of state judgments—narrowing to a year or less the previously unlimited exposure of such judgments to federal habeas challenge; barring successive rounds of at-

tacks upon state judgments made in, and nearly all attacks left out of, prior petitions; barring evidentiary attacks on state judgments that were not made in state court absent clear innocence; reinforcing a strict default rule; forbidding amendments; and sharply limiting appeals. *See* POB 25-26. And as he has shown, § 2254(d) adopts the Court's highly deferential *Teague* rule, *see, e.g., Butler v. McKellar*, 494 U.S. 407, 414-15 (1990), after making it markedly *more* deferential in several respects. *See* POB 25-33; p. 7 *supra*. Virginia's invocation of the concept of deference simply fails to grapple with the real questions —*how much* deference Congress meant to give state judgments and *how* it designed AEDPA to produce it.

Ultimately, Virginia's legislative-history argument rests on a negative—on the *absence in the floor debates* of a specific declaration that § 2254(d) adopts *Teague*. RB 28 n.19. It is true that no such declaration was issued on the floor (although it was made in other legislative sources: *see* ACLU Br. 27 (committee-hearing statements by Sen. Hatch and Thurmond and four state attorneys general lauding § 2254(d) because it would "*codify the Teague doctrine*"); Brief for Sen. Orrin G. Hatch as Amicus Curiae in *Felker v. Turpin*, 518 U.S. 651 (1996), 1996 WL 277110, at *24-25 (May 17, 1996) (§ 2254(d) "codified and strengthen[ed] the deference standard . . . in *Teague*")). But it is equally true that not a *single* § 2254(d) supporter made a *single* reference in *any* source to the case at the core of *Virginia's* argument: *Wright v. West*, 505 U.S. 277 (1992). *See* RB 18-19, 29 ("Congress intended" § 2254(d) to decide the issue the "*West* . . . Court debated, but ultimately did not decide").[10] Clearly, legislative-history-by-declaration-hunting is an unproductive means of construing statutes, *see NLRB v.*

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[10] Two *opponents* of § 2254(d) mentioned a separate opinion in *Wright*, but neither claimed—nor does Virginia say they claimed —that § 2254(d) was a response to *Wright*. *See* RB 29 n.20.

Health Care & Retirement Corp., 511 U.S. 571, 581 (1994) (citing cases), and offers no substitute for the kind of principled analysis of the statutory text, history and antecedents that Virginia shuns.

The statute's antecedents refute Virginia's construction. Virginia admits the Court should give "a term of art . . . borrowed from" the "*Teague* cases" its "settled and specific meaning." RB 16, 23. Virginia quotes the black-letter *Teague* rule, which (1) contains the "contrary to" and "unreasonable application" terms of art that § 2254(d) codifies and (2) gives both terms the meaning Williams ascribes to them in § 2254(d).[11] Virginia admits that this *Teague* rule " 'refused to give state prisoners the benefit of new rules of law, but . . . did not create any deferential standard of review with regard to old rules.' " RB 18 (quoting *Wright*, 505 U.S. at 304 (O'Connor, J., concurring)). Given these concessions, it is perverse that Virginia thereafter disregards the "settled and specific meaning" of the phrases § 2254(d) adopted from the *Teague* cases—plenary "contrary to" review under established law; deferential "unreasonable application" review in the absence of such law, POB 35-39—and spins those phrases into a formula for *overturning Teague*, concluding without explanation that "Congress . . . mandated the type of deference to state court determinations of mixed questions of law and fact that [the *Teague* cases] declined to mandate." RB 19.

Virginia resorts to alchemy in construing "clearly established law." It admits that § 2254(d) uses the phrase

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[11] RB 18, 25-26. Under the rule Virginia quotes, *Teague* "validates *reasonable . . . interpretations*"—or bars only *"unreasonable application[s]"*—of existing precedents that did not control the claim. *Gilmore v. Taylor*, 508 U.S. 333, 351 (1993) (O'Connor, J., concurring) (emphasis added); *Butler v. McKellar*, 494 U.S. 407, 414 (1990). Conversely, the rule requires habeas relief from any state judgment that on *plenary* review is "shown to be *contrary to*" federal decisions that *did* control the claim. *Id.* at 414; *see, e.g., Strickler*, 119 S. Ct. at 1952 n.35 (1999).

as "a term of art with a settled and specific meaning that Congress clearly borrowed from [the] . . . *Teague* cases." RB 23. It admits that the term is a synonym for an " 'old rule' "—a rule in place when the state court decided a claim, as to which (Virginia also admits) *Teague* review is *plenary* if the rule was "designed for the specific purpose of evaluating" the claim (*Wright*, 505 U.S. at 309 (Kennedy, J., concurring)). RB 18, 26. But Virginia then transmutes this "clearly borrowed" phrase—requiring *plenary* review when "old law" governed petitioner's claim —into something "far more limited than . . . 'plenary' review,": a standard demanding a "departure from . . . this Court's established precedents . . . so starkly unreasonable as to make the 'unlawfulness' of the state court decision 'apparent.' " RB 24-25. To do this, Virginia contrives a "link[]" between "clearly established" as used in the *Teague* cases and the phrase as used in the qualified immunity context, where it shields officers from damages for acts that not all "reasonable officer[s] would understand" were illegal (*Anderson v. Creighton*, 483 U.S. 635, 639 (1987)). RB 23.

This "link" is forged, however, from the frail reed of a "Cf." citation to *Anderson v. Creighton* in *Sawyer v. Smith*, 497 U.S. 227, 236 (1990). And the point made in *Sawyer* was *not* that deference is due the "mixed" decisions of state courts (or police officers) under old law, but only (as is true under Williams' reading of § 2254(d)) that a rule—"mixed" or otherwise—is not clearly established if it was not designed for the specific purpose of evaluating the claim at issue. *See id.* Virginia labors to concoct a "link" because, as between the meaning of "clearly established" in the *Teague* context and its more restricted meaning in qualified immunity law, § 2254(d)'s obvious referent is (as Virginia concedes) "the meaning of those terms as used by this Court in the context of federal collateral review of

state court criminal judgments." RB 16. This is especially plain because the Court has carefully limited qualified immunity to situations that contrast sharply with the habeas context: suits (1) against legally inexpert executive officials who have to act without the benefit of judicious deliberation (*see, e.g., Anderson*, 483 U.S. at 638), and (2) who are *personally liable* for *damages* (*cf. Ryder v. United States*, 555 U.S. 177, 185 (1995) (no immunity from injunctive or declaratory relief)), and (3) whose acts do not make "custom or policy," much less law (*see Board of County Comm'rs v. Brown*, 520 U.S. 397, 404 (1997); and *Allee v. Medrano*, 416 U.S. 802, 814-15 (1974) (relief required if official's acts amount to law, custom or policy); *compare* the Virginia Supreme Court's own declaration in *Williams*, 487 S.E.2d at 198, that the resolution of Williams' ineffectiveness claim is a "mixed" decision to be treated as one *of law*). In the end, Virginia's effort to substitute the *Anderson* definition of "clearly established" for the *Teague* definition which is the plain referent of § 2254(d) stumbles over the undeniable recognition in all the *Teague* cases that the adopted phrase—as Virginia puts it—is "*not* in conflict with de novo review of mixed questions and 'd[oes] *not* establish a deferential standard of review of state-court decisions [under preexisting] federal law.' " RB 18 (quoting *Wright*, 505 U.S. at 307 (Kennedy, J., concurring)).[12]

2. *Virginia's reading is not "clear" but bewildering*

Undisciplined by text, history or canons, Virginia gives § 2254(d) a shifting motley of opportunistic meanings. At times it adopts the Fifth, Seventh and Eleventh Circuits' bifurcation of claims into "pure law" and "mixed" questions—subjecting the former to "[d]e novo review"

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12 Senator Hatch did mention *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), but did not say § 2254(d) adopts its test. He used it only to show that "reasonableness" tests are not (as had been suggested) per se "problematic." 141 Cong. Rec. S7849 (June 7, 1995).

under the "contrary to" clause and the latter to "deferential review" under the "unreasonable application" clause (*Lindh v. Murphy*, 96 F.3d 856, 872 (7th Cir. 1996), *rev'd*, 521 U.S. 320 (1997)). RB 16, 29-31. *But see* AG Br. 7. Elsewhere, Virginia breaks with the "bifurcation" circuits, claiming that "contrary to" review is *not* 'plenary' " but inquires only whether the state decision was a "starkly unreasonable" departure from this Court's precedent because it reached the opposite result in a "*factual*[*ly*]" *identical* case. RB 21, 24-25, 29. *But see* CJLF Br. 23 ("contrary to" review is plenary).

In the second of these interpretations, Virginia reads the same standard of deference into both the "contrary to" and "unreasonable application" clauses, thus making nonsense out of Congress' distinction between them. But Virginia's *Anderson v. Creighton* argument arrives at a third interpretation still more bizarre. This reading (which, as we have shown, transfers the meaning of "clearly established law" from the qualified-immunity cases into habeas in disregard of the habeas caselaw and of the incommensurability of the two contexts) deprives *both* the "contrary to" *and* the "unreasonable application" clauses of any meaning by insisting that the "clearly established" clause itself demands undiscriminating deference across-the-board. Virginia's tangle of readings, each marring the text in its own way, reveals the damage done by shunning the words, history and canons, and by rejecting the coherent, workable formulation drawn from *Teague* that principled construction compels.

B. Properly Construed, § 2254(d) Codifies an Emended *Teague* Regime of Deference to State-Court Decisions, Turning the Standard of Review on the Existence of a Rule of Decision Clearly Established Beforehand by this Court

The statutory text and antecedents support Williams' construction. Section 2254(d) has words with a meaning

in everyday language and in the cases they come from. The words don't mean what Virginia claims. They do strengthen and codify *Teague*.

1. The thing to be reviewed under § 2254(d)'s "decision was contrary to law" clause is the state "decision"—which lay and legal dictionaries define as the application of law to fact to reach a conclusion. POB 33-34. "[D]ecision contrary to law" thus does not *exclude* review of "mixed" questions (as Virginia's "bifurcated" interpretation claims) but *commands* it if there is settled law to which a decision can be contrary. And (inconveniently for Virginia's other two interpretations) "contrary to law" review is defined in *Black's Law Dictionary* and (Virginia and *amici* admit) in the contexts of *Teague*, Rules 52(a) and 72(a), and the Magistrates Act—to require *plenary* review of all pure and mixed decisions under settled law. *See* POB 33-36; CJLF Br. 20 (plenary "'contrary to law' review in [these] contexts encompasses both law declaration and law application"); RB 18, 24-26 & n.14.

2. The thing to be reviewed under the "decision involved . . . an unreasonable application" clause is not—as in *all* of Virginia's readings—what the decision "*was*" (an application of law to fact), but what the decision "*involved*." And Congress specified the subject of review by taking § 2254(d)'s "unreasonable application" language *verbatim* from the *Teague* cases, where it means review of the reasonableness of a rule the state court devised because no controlling rule existed.

3. Congress also took "clearly established" from the *Teague* cases, and with it the distinction that the term erected there: between (1) a settled "rule designed for the specific purpose of evaluating" the claim at bar, grounding plenary review of whether the state decision "was consistent with [that] established constitutional stand-

ard,"[13] *Wright*, 505 U.S. at 309 (Kennedy, J., concurring); *Teague*, 489 U.S. at 306; and (2) "propositions [that] were the 'givens' from which any [rule] had to be derived," but "were *not* 'controlling authority,'" prompting deference. *Lambrix v. Singletary*, 520 U.S. 518, 529 & n.3 (1997). *See* POB 36.

The legislative history confirms Williams' construction. Virginia's "legislative history" consists mainly of quoting *opponents* of § 2254(d).[14] Williams could top each of these quotations with one from a *proponent*.[15] But this is not a game of dueling quotes. Although there are no committee reports explicating § 2254(d),[16] the meaning

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[13] This test includes rules of "general application designed for . . . a myriad of factual contexts," *if* this Court had *previously* and *expressly* held that "the rule in question is one which of necessity requires a case-by-case examination of the evidence." *Wright*, 505 U.S. at 309 (Kennedy, J., concurring). *See Strickland*, 466 U.S. at 698 (only a rule of general application can give proper meaning to the Sixth Amendment right to effective assistance of counsel).

[14] Virginia's chief authority on § 2254(d) is the section's chief opponent, Sen. Biden. RB 29 n.20; *see* AGs' Br. 16. *But see Bryan v. United States*, 118 S. Ct. 1939, 1947 (1998). Virginia asks why Biden was inflamed by an act that "merely codif[ied] *Teague*." RB 29. Biden had spent six years trying to *repeal Teague*—under which the Court barred relief in 13 of 15 cases—so it is no mystery why he was galled by a statute that, in its *author's words*, "codified *and strengthen*[*ed*] the deference standard . . . in *Teague*" (p. 10 *supra* (Sen. Hatch)). *See* S.1441, 103d Cong. § 4 (1993); S.618, 102d Cong. § 103 (1991); S.1757, 101st Cong. § 2262 (1989).

[15] *E.g.*, 141 Cong. Rec. S7846 (June 7, 1995), 142 Cong. Rec. S3446-47 (Apr. 17, 1996) (Sen. Hatch calling "absolutely false" Sen. Biden's claim that § 2254(d) required "defer[ence] to State courts in almost all cases, even if the State is wrong about the U.S. Constitution": § 2254(d) "gives the Federal courts authority to review, *de novo*, whether the State court decided the claim in contravention of Federal law"); POB 30-33 nn.13-14; ACLU Br. 25-29.

[16] The only report bearing on § 2254(d) is the Conference Report, which paraphrases the relevant language without explicating it: The statute "requires deference to the determinations of state courts that are neither 'contrary to' nor an 'unreasonable application of,' clearly established law." House Conf. Rep. No. 518, 104th Cong., 2d Sess. 111, 1996 U.S.C.C.A.N. 944.

of the section emerges unmistakably from a serious examination of the words Congress adopted and those it "rejected by removing from the [bill]." *Lonchar v. Thomas*, 517 U.S. 314, 327 (1996). That study proves Congress rejected Virginia's readings.

Emerging from Virginia's maze of rival readings is the rough bottom line that § 2254(d) divides claims into ones involving (A) the "*interpretation*" of Supreme Court law, and (B) its "application *to the facts*"—words not in § 2254(d)—and then limits review of both so as to require federal-court acceptance of state decisions in all but "rare" cases. RB 16, 20. Such a statute would read:

> An application for a writ of habeas corpus shall not be granted with respect to any claim adjudicated on the merits in State court unless the adjudication
>
> (1) resulted in a decision that was based on an arbitrary or unreasonable *interpretation* of clearly established Federal law as articulated in Supreme Court decisions; or
>
> (2) resulted in a decision that was based on an arbitrary or unreasonable application *to the facts* of clearly established Federal law as articulated in Supreme Court decisions.

This, though, is the very text of § 2254(d) that the House adopted but the Senate *rejected* in favor of the *actual* language (to which the House yielded).[17] "Few principles of statutory construction are more compelling than . . . that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442 (1987). Virginia would have the Court *reverse* Congress: putting in words Congress purposely dropped

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[17] H.R. 729, 104th Cong. (1995), *adopted*, 141 Cong. Rec. H1424-34 (Feb. 8, 1995) *replaced by* S.735, 104th Cong. (1995), *see* 141 Cong. Rec. S5842 (Apr. 27, 1995), *adopted by Senate, id.* S7857 (June 7, 1995), *and House*, 142 Cong. Rec. H3599 (Apr. 18, 1996).

—"unreasonable *interpretation*," "application *to the facts*" —and dropping words Congress purposely added—"contrary to law" and "unreasonable application."

Virginia misreads the lower courts. Virginia says the circuits agree with each other and its position. . . 21. They don't.[18] Many reject its view that § 2254(d) bifurcates claims into "pure" and "mixed"[19] and limits ineffectiveness claims to less than plenary review.[20]

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[18] The 1st, 3d and, evidently, 8th Circuits (*Richardson v. Bowersox*, 1999 WL 619067, at *2, *7 (Aug. 17, 1999)) apply the test that Williams advocates; the 5th, 7th and 11th Circuits use a "bifurcation" approach; the 4th Circuit uses a hybrid approach no one defends here. POB 39-44 & nn.20-21. The 9th Circuit allows relief even on claims that would be "new law" under *Teague* if "required by the force and logic" of Supreme Court decisions. *Davis v. Kramer*, 167 F.3d 494, 500 & n.7 (9th Cir. 1999), *followed*, *Furman v. Wood*, 1999 WL 675095 (9th Cir. Sept. 1, 1999) (withdrawing opinion cited by CJLF Br. 17). The 2d, 6th and 10th Circuits have reserved judgment, *Smalls v. Batista*, 1999 WL 619026, at *4 (2d Cir. July 30, 1999); *Nevers v. Killinger*, 169 F.3d 352, 357-61 (6th Cir. 1999); *Boyd v. Ward*, 179 F.3d 904, 912 (10th Cir. 1999), but all have given *plenary* review to "mixed" state-court decisions under established law, *Miller v. Champion*, 161 F.3d 1249, 1253-54 (10th Cir. 1998); *Warren v. Smith*, 161 F.3d 358, 360 (6th Cir. 1998); *Jones v. Vacco*, 126 F.3d 408, 417 (2d Cir. 1997). *No circuit has endorsed Virginia's rule of deference-across-the-board.*

[19] *See Matteo v. Superintendent*, 171 F.3d 877, 898 n.1 (3d Cir. 1999) (*en banc*) (Becker, C.J., concurring) ("bifurcated standard . . . is inconsistent with the text and legislative history"); *Nevers*, 169 F.3d at 359 (6th Cir.) (bifurcation "engrafts into the statute words—'questions of law,' and 'mixed questions of law and fact' —which Congress did not place there"); *Davis*, 167 F.3d at 500 & n.7 (9th Cir.) (same); *O'Brien v. Dubois*, 145 F.3d 16, 22 (1st Cir. 1998) ("The House . . . proposed a formulation closely akin to" the "bifurcated standard," but Congress "rejected it": it is "wrong[] . . . to scavenge discarded language from the legislative scrap heap and graft [it] onto" the act); *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998) ("statute . . . makes no distinction at all between the application of a legal principle to a new context and the application of such a principle to a particular set of facts").

[20] *See, e.g., Wilson v. Henry*, 1999 WL 543736 (9th Cir. July 28, 1999), and *Zarska v. Stewart*, 1999 WL 273310, at *2 (9th Cir. Apr. 28, 1999) (*Strickland* test is "clearly established," so courts con-

A court must read an act to avoid, not pose, "grave and doubtful constitutional questions." *Jones v. United States*, 119 S.Ct. 1215, 1222 (1999).[21] All Virginia's readings are problematic under the Constitution: they would make § 2254(d) do what has *never* been done in American law—oblige a federal court to review a state-court decision of constitutional law but forbid it to decide the issue independently. Or force a federal court to uphold a state-court decision it concludes was, when made, "contrary" to "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Such a rule would abrogate the "judicial Power" by forcing Article III courts to elevate state rulings over federal law in cases within their jurisdiction. POB 44-46, Former Judges' Br.; Academics' Br.

The doctrine cited in answer to this problem—the "full faith and credit" rule of 28 U.S.C. § 1738, *see* CJLF Br. 28—*proves Williams' point.* When Congress has *withheld* federal jurisdiction to review a state decision, § 1738 forbids litigants to obtain a circuitous appeal by invoking a federal court's original jurisdiction over the federal question the state court decided. *See Atantic Coast Line R.*

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duct plenary review whether "state court's conclusion . . . was . . . contrary to *Strickland*"); *Vieux v. Pepe*, 1999 WL 497872, at *3 (1st Cir. 1999) (if "Supreme Court holdings . . . erect a framework specifically intended for application to variant factual situations," they "sufficiently shape the contours of" analysis "to merit [plenary] review of a state court's decision under § 2254(d)'s 'contrary to' prong"; "*Strickland*" claims "fit this mold"); *Miller*, 161 F.3d at 1253-54 (10th Cir.); *Matteo*, 171 F.3d at 899 (Becker, J., concurring) (describing rule adopted by 3d Circuit).

[21] Avoiding constitutional problems is "essential to '. . . intelligent' " statutory construction, hence a "subsidiary question fairly included" in the statutory issues before the Court. *Jones v. United States*, 119 S. Ct. 2090, 2106 (1999); S. Ct. R. 14.1(a). Williams made the constitutional point below, not as a claim that § 2254(d) *is* unconstitutional (*cf. Williams*, 163 F.3d at 866 n.3, querying whether *that* claim was presented, then rejecting it on the merits), but, as here, in support of a statutory reading that is constitutionally secure, not suspect. *See* Appellee's Brief at 14.

Co. v. Bhd. of Locomotive Eng., 398 U.S. 281, 285-86 (1970). But when Congress expressly *grants* federal jurisdiction to review a state decision—as in the habeas statutes—§ 1738 is overridden. *See* citations in *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 15 (1992) (O'Connor, J., dissenting); *MacFarland v. Scott*, 512 U.S. 849, 857-58 (1994); POB 45 n.25; Former Judges Br. 22-25. Virginia's readings of § 2254(d) would compel federal judges *having* jurisdiction to uphold state decisions made in contravention of *established and binding* federal law, at "grave and doubtful" risk to the judicial Power created by Article III. The *Teague*-based construction rooted in § 2254(d)'s terms would not. The latter should prevail.[22]

Reading statutes to avoid constitutional doubt is not simply a canon aimed to avoid needless testing of the boundaries of congressional power. It also respects the expectations of the lawmaking branches that Congress' language will not be read improvidently as sweeping all our traditions into the fire. That expectation was explicitly voiced by the President in signing AEDPA:

> I expect that the courts, following their usual practice of construing ambiguous statutes to avoid constitutional problems, will read section [2254(d)] to permit independent Federal court review of constitutional claims based on the Supreme Court's interpretation of the Constitution and Federal laws.[23]

CONCLUSION

The Court of Appeals should be reversed.

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[22] *Chevron* deference does not extend to constitutional questions. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 575-76 (1988). Virginia's suggestion that it should, RB 25 n.14, reveals its recklessness.

[23] Statement by the President upon Signing AEDPA into Law, 1996 U.S.C.C.A.N. 961-2, 3 (Apr. 24, 1996).

Respectfully submitted,

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(11)

IN THE
Supreme Court of the United States

TERRY WILLIAMS,

Petitioner,

v.

JOHN TAYLOR, Warden,
Sussex 1 State Prison,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF AMICUS CURIAE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American Bar Association ("ABA") respectfully submits this brief as *amicus curiae* pursuant to Rule 37.3 of the Rules of this Court.[1] The ABA is a voluntary, national membership organization of the legal profession.[2] Its more than 400,000 members, from each state and territory and the District of Columbia, include prosecutors, public defenders, private lawyers, judges, legislators, law professors, law enforcement and corrections personnel, law students and a number of "non-lawyer" associates in allied fields.

Although the ABA has not taken a position on the constitutionality of the death penalty, the ABA is dedicated to the promotion of a fair and effective system for the administration of justice. *See* ABA Const. art. 1, § 1.2. The ABA has made the right to effective assistance of counsel in capital cases and the preservation of the writ of *habeas corpus* a priority. The ABA promulgates standards and guidelines for the effective representation of criminal defendants, with particular emphasis upon representation in capital cases. *See, e.g.*, ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989) and the ABA *Standards for Criminal Justice* (2d ed. 1980).

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[1] Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae*, its members, or counsel have made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37 of the Rules of the Court, the parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk of the Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

The ABA has adopted policy statements and issued reports urging specific reforms in federal and state post-conviction procedures.[3] The ABA has presented testimony and written materials at congressional hearings with respect to reform of the *habeas corpus* statutes.[4] In 1989, under a grant from the State Justice Institute, an ABA task force conducted a nationwide study of death penalty *habeas corpus* practice and procedures. Based upon the task force's report and recommendations, the ABA in 1990 adopted, by overwhelming vote, a comprehensive policy statement that urged legislative reform of *habeas corpus* procedures, both state and federal, to make them more efficient and better able to address the merits of the fundamental claims many post-conviction petitions raise in capital cases. *See* Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 Am. U. L. Rev. 1 (1990) (task force report).

Simultaneous with this review, the ABA House of Delegates in February 1989 adopted *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, to "amplify previously adopted Association positions

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[3] *See, e.g., Resolution of the ABA House of Delegates* 112D (1982) (the ABA resolved to "support the prompt availability of competent counsel for both state and federal [post-conviction] proceedings"); *Resolution of the ABA House of Delegates* (Feb. 1988) (resolution calling for the federal government to adopt procedures and standards for the appointment of counsel for death row inmates in federal *habeas corpus* proceedings).

[4] *See, e.g., Fairness and Efficiency in Habeas Corpus Adjudication: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. (1991) (statement of John J. Curtin, Jr., President of the ABA and of James S. Liebman, Professor of Law, Columbia University School of Law, and Member, ABA Task Force on Death Penalty Habeas Corpus); *Habeas Corpus: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990) (statement of L. Stanley Chauvin, Jr., President of the ABA).

on effective assistance of counsel in capital cases." These Guidelines were intended to "enumerate the minimal resources and practices necessary to provide effective assistance of counsel." *Resolution of the ABA House of Delegates* (Feb. 1989).

On February 3, 1997, the ABA House of Delegates adopted a resolution calling for each jurisdiction that imposes the death penalty to impose a moratorium on executions until the jurisdiction implemented policies and procedures – including *inter alia* adherence to the *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* – to ensure that death penalty cases are administered fairly and impartially and to minimize the risk that innocent persons may be executed. *See Resolution of the ABA House of Delegates* (Feb. 1997).

This case raises important questions concerning the administration of the death penalty, the right to counsel, and the relationship between the federal and state courts in *habeas corpus* proceedings – issues that long have been and are today of vital concern to the ABA.

STATEMENT OF THE CASE

While *Amicus* adopts the Statement of the Case in the brief of Petitioner, several points merit emphasis. First, it is incontrovertible that during the sentencing phase, petitioner's trial counsel failed to investigate or present highly significant mitigating evidence. As the Virginia Supreme Court recognized: "[t]here is no doubt there was such evidence." *Williams* v. *Warden*, 487 S.E.2d 194, 198 (Va. 1997). Although this evidence was readily discoverable, petitioner's counsel neither uncovered this evidence nor presented it to the jury that was faced with the life or death decision. The mitigation evidence – described as "compelling" by the District Court and as "critical" by the state trial judge – included the following information:

- Petitioner was born at home, weighing only four pounds, to a mother who drank herself into a stupor on bootleg liquor almost daily while pregnant (Danville Circuit Ct. Op. at 19; District Ct. Op. at 21-22);

- Petitioner was borderline mentally retarded (Danville Circuit Ct. Op. at 43; District Ct. Op. at 24);

- After petitioner's mother was imprisoned for child neglect, petitioner was placed in foster care for several years (District Ct. Op. at 22);

- After being returned to his parents' home, petitioner was beaten regularly by his father (Danville Circuit Ct. Op. at 19);

- Although petitioner was incarcerated as a juvenile and as an adult, his correctional records established that he received high commendations from prison staff for good conduct (Danville Circuit Ct. Op. at 43; District Ct. Op. at 24);

- Two separate correctional officers stated that they were willing and available to testify to petitioner's model behavior as a prisoner and lack of propensity to violence (Danville Circuit Ct. Op. at 43; District Ct. Op. at 24); and

- A respected local accountant, who had befriended petitioner through a church ministry program, would have told the jury that he did not consider petitioner to be a violent person and that he had invited petitioner to stay in his home overnight (Danville Circuit Ct. Op. at 19-20; District Ct. Op. at 24).

Second, in light of the record, the conclusion that petitioner was not competently represented is inescapable. All four of the courts below that considered this case either specifically found that counsel's performance was substandard or assumed that counsel's conduct should be regarded as objectively unreasonable.[5] Counsel had a duty to explore every avenue leading to evidence mitigating against a death penalty, and counsel's failure to do so and to present to the jury any of this mitigating evidence falls far short of any reasonable benchmark of competent advocacy, including the minimum requirements set forth by the ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989), Guidelines 11.8.3, 11.8.6, and the ABA *Standards for Criminal Justice*, Standard 4-4.1. *See also* Danville Circuit Ct. Op. at 44.

Third, it is noteworthy that both of the trial courts that reviewed this case – the state trial judge (who presided over Williams' trial and sentencing, and directly observed counsel's performance and the jurors in this case) and the federal district court judge (who has over 17 years experience presiding over jury trials) – found that, in light of

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[5] *See Williams* v. *Netherland*, Case No. LP88-81 (Danville Cir. Ct. Aug. 15, 1996) at 44 ("Counsel's failure to present favorable mitigation evidence which was available upon investigation and development falls below the range expected of reasonable, professional competent assistance of counsel . . . ") ("Danville Circuit Ct. Op.") (Appendix 2 to Pet. for Writ of Certiorari); *Williams* v. *Warden*, 487 S.E.2d 194, 198 (Va. 1997) ("there was evidence in mitigation that was available but not presented at the criminal trial. There is no doubt there was such evidence; the facts really are not in dispute."); *Williams* v. *Pruett*, Civ. Act. No. 97-1527-A (E.D. Va. Apr. 7, 1998) at 34 ("The Court finds that Williams was not afforded effective representation at the sentencing stage of his trial.") ("District Ct. Op.") (Appendix 1 to Pet. for Writ of Certiorari); *Williams* v. *Taylor*, 163 F.3d 860, 867 (4th Cir. 1998) ("we will assume, without deciding, that Williams's trial counsel were objectively unreasonable in failing to investigate, prepare, and present certain evidence in mitigation of punishment . . .").

the Virginia statute requiring unanimity by the jury before the death penalty can be imposed, *see* Virginia Code § 19.2 – 264.4(E), the failure of trial counsel to investigate and present this mitigation evidence prejudiced Williams during his sentencing proceeding.[6]

The Virginia Supreme Court and the Fourth Circuit diverged with the state trial court and the District Court on the issue of whether petitioner was "prejudiced" by counsel's "deficient performance." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Instead of measuring prejudice under the *Strickland* standard – determining whether there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" – both appellate courts concluded that petitioner failed to meet a higher standard purportedly established in *Lockhart v. Fretwell*, 506 U.S. 364 (1993) – that "the result of the proceeding was [fundamentally] unfair or unreliable." *Williams* v. *Taylor*, 163 F.3d at 867, 868; *Williams* v. *Warden*, 487 S.E.2d at 198, 200. Thus, *while recognizing* that substantial evidence in mitigation never was presented to the sentencing jury, both courts concluded that petitioner had failed to establish prejudice. *Williams* v. *Taylor*, 163 F.3d at 868; *Williams* v. *Warden*, 487 S.E.2d at 200. Moreover, the Fourth Circuit concluded that the fact that one of the jurors might have been swayed by this evidence (with the result that under Virginia law the death penalty would

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[6] *See* Danville Circuit Ct. Op. at 44 ("because this evidence is so crucial to the outcome of the jury's ultimate decision of life or death, it is prejudicial to a defendant when it is not presented at the sentencing phase . . . Terry Williams needed anything and everything that might be available as favorable evidence to persuade the jury to save his life. Anything less was not enough."); District Ct. Op. at 30 ("Given the amount of mitigating evidence not presented to the jury, the compelling nature of such evidence, and the fact that none of such evidence was cumulative, the Court concludes that there is a reasonable probability that had the jury heard this evidence, at least one juror and perhaps all, would have concluded that the death penalty was not warranted.").

not have been imposed) was simply "insufficient to establish prejudice." *Williams* v. *Taylor*, 163 F.3d at 868.

The Fourth Circuit then compounded its flawed interpretation of *Strickland* by concluding that 28 U.S.C. § 2254(d)(1) relieved the federal courts of their obligation to independently review the legal or factual determinations of the state courts. *See* 163 F.3d at 865 (concluding that "*habeas* relief is authorized only when the state courts have decided . . . in a manner that reasonable jurists would all agree is unreasonable") (citing *Green* v. *French*, 143 F.3d 865, 870 (4th Cir. 1998)). This too was an incorrect interpretation of the law, and constitutes an unconstitutional abdication of federal judicial authority that cannot be permitted to stand.

SUMMARY OF ARGUMENT

The ABA submits this *Amicus* brief for two reasons. First, the ABA is deeply concerned that the Fourth Circuit's decision erroneously alters the "prejudice" standard formulated in *Strickland*. If not corrected, the Fourth Circuit's opinion will cause confusion among lower courts and inconsistent enforcement of the Sixth Amendment right to counsel.

Thirty-six years ago, this Court held it to be "an obvious truth" that no criminal defendant could be "assured a fair trial" without the assistance of counsel and required the states to provide an attorney to "any person haled into court, who is too poor to hire a lawyer." *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963). Two decades later, in *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court, reinforcing *Gideon*, held that the constitutional right to counsel includes not simply a right to a lawyer, but a right to "effective representation" by that lawyer in the adversarial system. In *Strickland*, this Court adopted a two-part test: (i)

"the defendant must show that counsel's performance was deficient," *i.e.* "that counsel's representation fell below an objective standard of reasonableness," *id.* at 687-88, and (ii) "[t]he defendant must show that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

If the lower court decision is allowed to stand, the "obvious truth[s]" embodied in *Gideon* and *Strickland* – truths that have become the bedrock of our criminal justice system in which the great majority of defendants are indigents represented by appointed counsel[7] – will stand on fragile ground. In the present case, the Fourth Circuit failed to adhere to the *Strickland* standard, crafting instead a new rule for evaluating prejudice based upon a misinterpretation of *Lockhart* v. *Fretwell*, 506 U.S. 364 (1993). In *Fretwell*, this Court concluded that it would constitute "a windfall" to grant a petition for habeas relief in the unusual situation where trial counsel had failed to object based upon precedent that was subsequently overruled; in those particular circumstances, the "result of the sentencing proceeding . . . was rendered neither unreliable nor fundamentally unfair." *Id.* at 366. The Virginia Supreme Court and the Fourth Circuit interpreted *Fretwell* to "clarif[y]" *Strickland* to require that for every claim of ineffective assistance of counsel, petitioner demonstrate that the result of a proceeding is "fundamentally unfair or unreliable." *Williams* v. *Taylor*, 163 F.3d at 867; *Williams* v. *Warden*, 487 S.E.2d at 198. Rather than evaluating the impact of counsel's deficient performance on the sentencing proceeding, these courts concluded that petitioner had not met this heightened standard for establishing prejudice.

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[7] *See* Robert L. Spangenberg and Tessa J. Schwartz, *The Indigent Defense Crisis is Chronic*, 9-SUM Crim. Just. 13, 14 (1994).

If permitted to stand, this unwarranted grafting of *Fretwell's* "windfall" exception onto the *Strickland* test for evaluating prejudice will seriously undermine the right to counsel. Both appellate courts reversed the grant of a writ of *habeas corpus* in this case, although both the state trial judge and an experienced District Court judge found that petitioner had not been effectively represented at the sentencing stage of his trial and that if he had been so represented there was a reasonable probability the death penalty would not have been imposed. In so doing, the Fourth Circuit and the Virginia Supreme Court have raised the bar on *Strickland* claims so high as to seriously threaten judicial enforcement of the right to effective assistance of counsel in capital cases. This result simply cannot be squared with either *Strickland* or *Gideon*.

Where – as here – counsel has access to substantial, "compelling" or "critical" mitigating evidence but unreasonably does not present that evidence in a sentencing proceeding in which jury unanimity is required to impose the death penalty, petitioner has established prejudice under *Strickland*. Numerous decisions are in accord with that conclusion. The state trial court and the District Court correctly concluded that there was a reasonable probability that but for counsel's errors, the result of the sentencing phase would have been different, and the death penalty would not have been imposed. The Fourth Circuit and the Virginia Supreme Court's requirement that petitioner must bear the additional burden of somehow further demonstrating that the proceeding was "fundamentally unfair or unreliable" is simply not supported by *Strickland*, and if generally applied, would seriously undermine the Sixth Amendment.

Second, the ABA objects to the Fourth Circuit's erroneous interpretation of the right to federal *habeas corpus* review under 28 U.S.C. § 2254(d)(1). The ABA unqualifiedly supports a strong, independent federal judiciary. The Fourth Circuit's construction of 28 U.S.C. §

2254(d)(1) – which requires *habeas* courts to defer to state court interpretations of federal law, unless the state court opinion is in "square conflict" with Supreme Court precedent or adopted an interpretation of federal law which "reasonable jurists would all agree is unreasonable" – precludes an independent review of constitutional claims in a case over which a federal court has jurisdiction. *See Marbury* v. *Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."); *Martin* v. *Hunter's Lessee*, 14 U.S. 304, 348 (1816) ("Judges of equal learning and integrity, in different states, might differently interpret a statute . . . If there were no revising authority to control these jarring and discordant judgments . . . the public mischiefs that would attend such a state of things would truly be deplorable."). The ABA submits that the Fourth Circuit's construction of Section 2254(d)(1) cannot be squared with the federal courts' independent interpretive authority under Article III.

ARGUMENT

I. THE FOURTH CIRCUIT'S FAILURE TO APPLY THE *STRICKLAND V. WASHINGTON* TEST ENDANGERS THE CONTINUING VITALITY OF *GIDEON V. WAINWRIGHT*.

In *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), this Court concluded that the right to counsel in state criminal prosecutions is a fundamental right guaranteed by the Fourteenth Amendment. In the years following *Gideon*, a number of lower courts undermined the guarantee by suggesting, for a variety of reasons, that the right to counsel did not involve a right to effective counsel. Thus, some courts concluded that the right was not violated unless it was demonstrated that counsel's performance was so deficient

that the proceeding was a "farce and mockery" of justice[8] or amounted to "gross incompetence."[9]

Two decades after this Court granted Clarence Gideon's *habeas* petition, it revisited these issues. In *Strickland* v. *Washington*, 466 U.S. 668, 686 (1984), the Court stressed that "[t]he right to counsel is the right to the effective assistance of counsel." (emphasis added.) Noting that several state courts had adamantly refused to recognize that there was a right to "reasonably effective counsel," *id.* at 683, and that this may have been because the Court had not recognized (except in dicta) that there was a right to effective counsel, the Court stated:

> That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.

Id. at 685.

Strickland announced a two-part standard to guide the lower courts in resolving claims of ineffective assistance

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[8] *See, e.g., United States* v. *Baca*, 451 F.2d 1112, 1114 (10th Cir. 1971); *United States* v. *Roche*, 443 F.2d 98, 99-100 (10th Cir. 1971); *United States* v. *Cox*, 439 F.2d 86, 87-88 (9th Cir. 1971). The "farce and mockery" test – which significantly predated *Gideon, see, e.g., Diggs* v. *Welch*, 148 F.2d 667, 668 (D.C. Cir. 1945) – persisted until only months before the *Strickland* opinion was issued. *See Trapnell* v. *United States*, 725 F.2d 149, 155 (2d Cir. 1983) (last federal court of appeals to abandon "farce and mockery" test).

[9] *See, e.g., Scott* v. *United States*, 427 F.2d 609, 610 (D.C. Cir. 1970); *Bruce* v. *United States*, 379 F.2d 113, 116-17 (D.C. Cir. 1967).

of counsel: (i) "the defendant must show that counsel's representation fell below an objective standard of reasonableness," *id.* at 687-88, and (ii) "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is probability sufficient to undermine confidence in the outcome." *Id.* at 694. In the fifteen years since *Strickland*, lower courts have consistently applied these two standards in order to evaluate claims of ineffective assistance of counsel.

Moreover, in the fifteen years since *Strickland*, this Court has not revisited its standards for assessing claims of ineffective assistance of counsel. Although it examined the application of the *Strickland* test in the highly unusual factual context presented by *Lockhart* v. *Fretwell*, 506 U.S. 364 (1993), involving a claim based upon precedent that had been overruled in the intervening period between petitioner's trial and post-conviction proceedings, this Court has never announced or otherwise suggested that the *Strickland* test has been altered so as to require an additional analysis such as that invoked by the Virginia Supreme Court and the Fourth Circuit. Thus, in light of the continued vitality of the *Strickland* standards, it is all the more striking that both the state Supreme Court and the Fourth Circuit effectively jettisoned the prejudice prong in favor of *Fretwell*'s "windfall" analysis, denying relief unless "the result of the proceeding was [fundamentally] unfair or unreliable." *Williams v. Taylor*, 163 F.3d at 869. These courts erred in reaching this result.

II. PROPER APPLICATION OF THE *STRICKLAND* STANDARD TO THE FACTS OF THE PRESENT CASE REQUIRES THAT PETITIONER BE GRANTED RELIEF.

If the Court of Appeals had properly applied *Strickland*, it would have affirmed the judgment of the District Court that Williams be granted a writ of *habeas corpus*. All four lower courts either expressly found or accepted the conclusion that the failure of petitioner's counsel to investigate and present mitigating evidence at the sentencing phase of the trial constituted ineffective assistance of counsel. *See supra* note 5. This mitigation evidence, described in detail by the District Court, included testimony from (i) family members concerning petitioner's upbringing in an atmosphere of chronic abuse and neglect; (ii) psychologists concerning the petitioner's borderline mental retardation; (iii) correctional officials concerning the petitioner's model behavior as a prisoner and lack of propensity to violence; and (iv) a respected community and business leader concerning the petitioner's character and potential for rehabilitation. *See* District Ct. Op. at 21-24.

Reviewing this evidence, the state court judge who presided over petitioner's trial and sentencing specifically found that "[c]ounsel's failure to present favorable mitigation evidence which was available upon investigation and development falls below the range expected of reasonable, professional competent assistance of counsel." *See* Danville Circuit Ct. Op. at 44.[10]

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[10] The Virginia state judge also noted that the conduct of petitioner's counsel failed to meet the standards set by the ABA's *Standards for Criminal Justice*. *Id.* (quoting Standard 4-4.1 (2d Ed. 1980)). The conduct of petitioner's counsel also fell short of the "minimum requirements" established in the ABA 1989 *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guidelines 11.8.3 and 11.8.6.

The disagreement in this case reflected in the various lower court opinions is not about whether petitioner was competently represented. Manifestly, he was not. The issue is whether the Virginia Supreme Court and the Court of Appeals applied the correct standard for evaluating prejudice, and whether, if the appropriate standard were applied, petitioner would be entitled to relief. It is noteworthy that the state judge who presided over the sentencing hearing and directly observed counsel, the witnesses and – most significantly – the jurors, applied the *Strickland* test and concluded that the failure to present this evidence was clearly prejudicial under that standard. Danville Circuit Ct. Op. at 44 ("because this evidence is so crucial . . . it is prejudicial to a defendant when it is not presented"). Similarly, the District Court judge, who also applied *Strickland*, found that "had the jury heard this evidence, at least one juror and perhaps all, would have concluded that the death penalty was not warranted." District Ct. Op. at 30. The findings and conclusions of these two experienced trial judges are entitled to substantial weight. The Virginia Supreme Court and Court of Appeals erroneously rejected these rulings.

A. The Overwhelming Majority of Federal Courts Applying *Strickland* Have Repeatedly Concluded That the Failure To Investigate and Introduce Mitigating Evidence at the Sentencing Stage of a Capital Trial Is Prejudicial to the Defendant.

The Fourth Circuit and the Virginia Supreme Court's approach to evaluating the conduct of petitioner's counsel is inconsistent with numerous decisions of this Court which have affirmed the importance of mitigating evidence at the sentencing stage of a capital trial. Moreover, it is dramatically at odds with the manner in which other federal

appellate courts have approached similar instances of deficient performance. In fifteen years of application of *Strickland*, many courts have concluded that the failure to seek out or present substantial favorable mitigation evidence at the sentencing phase of a capital trial is prejudicial to the defendant. The position of the Fourth Circuit is well outside the mainstream.

First, this Court has frequently recognized the special, constitutionally impelled role of mitigating evidence in capital sentencing proceedings. As the Court has stated, in capital cases, the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Penry* v. *Lynaugh*, 492 U.S. 302, 328 (1989) (reversing death sentence where jury was not instructed that it could consider mitigating evidence beyond enumerated factors) (quoting *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) and *Eddings* v. *Oklahoma*, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring)). *See also Hitchcock* v. *Dugger*, 481 U.S. 393, 398-99 (1987) (reversing death sentence where jury instruction limited mitigating factors jury could consider); *Skipper* v. *South Carolina*, 476 U.S. 1, 4-8 (1986) (reversing death sentence where trial court excluded mitigating evidence as irrelevant); *Eddings*, 455 U.S. at 113-16 (reversing death sentence where sentencing judge refused to consider mitigating evidence); *Lockett*, 438 U.S. at 604-08 (plurality opinion) (reversing death sentence and striking down Ohio death penalty statute where statute limited mitigating evidence sentencing judge could consider). It is for this reason that "the sentencer may not . . . be precluded from considering any relevant mitigating evidence" in determining whether or not to impose a death sentence. *Hitchcock*, 481 U.S. at 394 (internal quotation marks omitted).

The imposition of a death sentence on a defendant whose counsel unreasonably fails to present reliable mitigating evidence effectively circumvents this fundamental constitutional protection. *See Deutscher* v. *Whitley*, 884 F.2d 1152, 1161 (9th Cir. 1989) ("The Constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy.") (citing *California* v. *Brown*, 479 U.S. 538, 554 (1987)), *writ granted after subsequent history*, 16 F.3d 981 (9th Cir. 1994).

Second, recognizing the critical importance of mitigating evidence in the sentencing process, many lower appellate courts have ruled that counsel's failure to present such evidence is prejudicial.[11] For example, in *Kubat* v. *Thieret*, 867 F.2d 351 (7th Cir. 1989), defense counsel did not present any character evidence at the penalty phase of a sentencing hearing and instead simply begged the jury for mercy. The Seventh Circuit found that the prejudice component was clearly satisfied, stating that:

> [C]ounsel, in effect, presented no defense at the sentencing hearing. We view this failure of counsel as "a breakdown in the adversarial process that our system counts on to produce just results." On this basis alone, our confidence in the outcome is sufficiently undermined to find that Kubat was prejudiced.

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[11] The Ohio Supreme Court concluded in *Ohio* v. *Johnson*, 494 N.E.2d 1061, 1063 n.4 (Ohio 1986), that the failure to investigate or present mitigation evidence was a severe enough deficiency under *Strickland* and *United States* v. *Cronic*, 466 U.S. 648 (1984), to be treated as presumptively prejudicial. *See also Blake* v. *Kemp*, 758 F.2d 523, 533 (11th Cir. 1985) (noting that it was a "very close question" whether failure to investigate or present substantial mitigation evidence should constitute presumptive prejudice under *Strickland* and *Cronic*).

Id. at 369 (internal citations omitted). Addressing a similar situation a decade later, in a case in which trial counsel had failed to investigate and present readily available mitigating evidence, the Seventh Circuit concluded that counsel's efforts during the sentencing phase were clearly deficient and prejudicial:

> With no evidence of mitigation before the jury despite irrefutable evidence of aggravating circumstances, with need to convince only one of twelve jurors to refuse to go along with a death sentence, and with no statutory or caselaw definition of mitigating circumstances that might enable us to say that the mitigating circumstances found in the investigation by [petitioner's] current lawyers are in fact irrelevant, the possibility that a case in mitigation along the lines devised by these lawyers might have saved [petitioner] from the death penalty cannot confidently be reckoned trivial. The mitigation specialist's 30-page single-spaced report is a moving narrative of a life that one juror in twelve might find so bleak, so deprived, so harrowing, so full of horrors (including the death of [petitioner's] child, possibly strangled by her mother, and the death of one of [petitioner's] brothers by shooting), as to reduce [petitioner's] moral responsibility for the murder of Byrd to a level at which capital punishment would strike that juror as excessive or one or more of the jurors would think [petitioner] deserving of mercy.

Emerson v. *Gramley*, 91 F.3d 898, 907 (7th Cir. 1996) (internal citation omitted).

The Ninth Circuit reached a similar conclusion in *Clabourne* v. *Lewis*, 64 F.3d 1373 (9th Cir. 1995), where defense counsel failed to introduce any evidence of the defendant's history of mental illness at the sentencing phase. The court concluded that:

> [Counsel's] representation at the sentencing hearing amounted in every respect to no representation at all, and the total absence of advocacy falls outside *Strickland*'s "wide range of professionally competent assistance". . . . [The] deficient performance was decidedly prejudicial: There is a reasonable probability that, but for [counsel's] failure to pursue [the] defense diligently at the sentencing phase, the judge would have imposed a sentence other than death.

Id. at 1387 (internal citations omitted).

These views are in accord with the conclusion reached by the overwhelming majority of federal appellate courts that have addressed trial counsel's failure to present reasonably available mitigation evidence at the sentencing phase of a capital trial. Moreover, their analyses are consistent both before and after this Court's decision in *Fretwell*. In short, *Fretwell* simply is not relevant to the prejudice inquiry. *See, e.g., Austin* v. *Bell*, 126 F.3d 843, 849 (6th Cir. 1997) (concluding that defense counsel's failure to present any mitigating evidence constitutes "an abdication of advocacy," which "undermined the adversarial process"); *Hill* v. *Lockhart*, 28 F.3d 832, 846 (8th Cir. 1994) ("[we are] unwilling to declare that, if the jury had found at least one mitigating circumstance, it would have found, beyond a reasonable doubt, that the aggravating circumstances outweighed the mitigating circumstances."); *Loyd* v. *Whitley*, 977 F.2d 149, 160 (5th Cir. 1992)

("[B]ecause of counsel's inadequacy [in failing to present expert psychiatric testimony] the jury could not perform [its] function"); *Armstrong* v. *Dugger*, 833 F.2d 1430, 1434 (11th Cir. 1987) ("The demonstrated availability of undiscovered mitigating evidence clearly met the prejudice requirement [of *Strickland*]."); *Blake* v. *Kemp*, 758 F.2d 523, 535 (11th Cir. 1985) ("[W]e find it a close question whether the petitioner received any defense at all in the penalty phase.").[12]

The District Court cogently summarized the state of the record in these words:

> Given the amount of mitigating evidence not presented to the jury, the compelling nature of such evidence, and the fact that none of such evidence was cumulative, the Court concludes that there is a reasonable probability that had the jury heard this evidence, at least one juror and perhaps all, would have concluded that the death penalty was not warranted.

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[12] Numerous state courts have also found prejudice when confronted with deficient performance similar to that suffered by petitioner. *See, e.g.*, *Louisiana* v. *Sanders*, 648 So. 2d 1272, 1293 (La. 1994) ("counsel's failure to prepare at all for the penalty phase . . . resulted in advocacy for the defendant that was tepid and virtually non-existent") (internal quotation omitted); *Phillips* v. *Florida*, 608 So. 2d 778, 783 (Fla. 1992) (concluding that where defense counsel failed to present any mitigating evidence other than testimony of defendant's mother and other evidence was readily available, "but for counsel's deficient performance . . . the vote of one juror would have been different, thereby . . . resulting in a recommendation of life"); *Ohio* v. *Johnson*, 494 N.E.2d 1061, 1067 (Ohio 1986) ("Where absolutely no evidence in mitigation is offered by the defense, and no attempt is made to prevent the cumulation of impermissible aggravating factors, the defendant is exposed to an inexcusably heightened probability of receiving a sentence of death.").

District Ct. Op. at 30. This conclusion was well-grounded and should not have been disturbed by the Fourth Circuit on appeal.

B. The Virginia Supreme Court and the Court of Appeals Erred by Failing To Apply the *Strickland* Standard of Prejudice and in Holding Instead That This Court's Decision in *Lockhart* v. *Fretwell* Formulated the Standard That Is Controlling in the Present Case.

Neither the Virginia Supreme Court nor the Court of Appeals applied the *Strickland* prejudice test in the present case. Instead, these courts improperly concluded that prejudice was to be assessed under a standard formulated by this Court in *Lockhart* v. *Fretwell*, 506 U.S. 364 (1993).

The Court of Appeals determined that the *Strickland* standard was inapplicable in this case because, in its view, "the Supreme Court clarified the meaning of prejudice" in *Fretwell*. 163 F.3d at 866. The Fourth Circuit characterized the *Strickland* opinion as "focus[ing] primarily on whether 'the result of the proceeding would have been different,' " *id.*, and went on to say that *Fretwell* was "a clarification" of *Strickland* which requires the defendant "alleging prejudice [to] show that the result of the proceeding was [fundamentally] unfair or unreliable." *Id.* at 869. While the Court of Appeals spoke of *Fretwell* as a "clarification" of *Strickland*, it plainly was of the view that the "fundamentally unfair or unreliable" standard in *Fretwell* superseded *Strickland* as the controlling standard in cases involving claims of ineffective assistance of counsel. *Id.* (stating *Fretwell* is "the rule, not the exception").

The Court of Appeals and the Virginia Supreme Court erred in failing to apply *Strickland* and in following a

different standard. *Fretwell* is clearly distinguishable from the present case. Moreover, *Fretwell* did not announce a modification of *Strickland* nor the adoption of a new prejudice test to be applied as a general rule in assessing claims of ineffective assistance of counsel. Both the Fourth Circuit and the state Supreme Court wrenched language out of context in applying the *Fretwell* formula to this case.

Fretwell involved highly unusual circumstances that are markedly different from the present case. The question presented in *Fretwell*, in the words of the Court, was "whether counsel's failure to make an objection in a state criminal sentencing proceeding – an objection that would have been supported by a decision which subsequently was overruled – constitutes prejudice within the meaning" of *Strickland*. 506 U.S. at 366. Since it had been decided subsequent to Fretwell's trial that there was no legal basis for the objection, petitioner was not actually deprived of any right.[13] As made clear by both the concurring opinion of Justice O'Connor and the dissenting opinion of Justice Stevens, the issue that divided the Court was whether counsel's performance and the prejudice issue were to be assessed by the law prevailing as of the time of trial and sentencing or alternatively, as the Court concluded, controlling precedents as of the time of the post-conviction proceedings. In her concurring opinion, Justice O'Connor emphasized that the Court was deciding a "narrow" question in the context of a highly unusual set of facts: "today we hold that the court making the prejudice determination may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission." 506 U.S. at 374 (O'Connor, J., concurring). It

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[13] The lack of prejudice in such a situation is clear. If petitioner in *Fretwell* had been granted a new trial, it would have been a literal repeat of the first trial, because he would not be entitled to the objection purportedly omitted at the first trial.

was in this limited context, then, that the Court in *Fretwell* made the statement that "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." 506 U.S. at 369-70.

There is, of course, no change of law issue in this case. Far from the unusual circumstances that spawned *Fretwell*, petitioner's case involves straightforward attorney error – trial counsel failed to provide the jury with compelling and substantial mitigating evidence that the jury had a right to consider in deciding whether petitioner would live or die. Indeed, there is a striking similarity between the harm done to petitioner by his attorney's deficient representation and that suffered by capital defendants who have been granted relief under a proper application of the *Strickland* test. *See, e.g., Hill* v. *Lockhart*, 28 F.3d 832, 846 (8th Cir. 1994); *Loyd* v. *Whitley*, 977 F.2d 149, 160 (5th Cir. 1992); *Armstrong* v. *Dugger*, 833 F.2d 1430, 1434 (11th Cir. 1988).

Moreover, there is no possibility of a windfall in this case. Williams has a constitutional right, both under the law applicable at the time of sentencing and under present law, to have all possible mitigating evidence placed before the jury considering whether he should live or die. *See, e.g., Hitchcock* v. *Dugger*, 481 U.S. 393, 394 (1987) ("the sentencer may not . . . be precluded from considering any relevant mitigating evidence" in determining whether or not to impose a death sentence). A holding that Williams' sentence was defective because of failure to present this evidence would not result in any "windfall" for him. [14]

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[14] It does not appear that *Fretwell* has been inappropriately extended outside the "windfall" context. *See, e.g., Lucas* v. *O'Dea*, __ F.3d __, 1999 WL 346166 at *5-6 (6th Cir. 1999) (applying *Strickland* prejudice standard in finding ineffective assistance where counsel failed to object

Thus, contrary to the conclusion of the Court of Appeals, *Fretwell* did not displace the *Strickland* "rule." *See* 163 F.3d at 869. The *Fretwell* opinion nowhere states or otherwise suggests that it is announcing a modification, clarification or adoption of any new generally applicable prejudice test to assess ineffective assistance claims. The parties and *amici* in *Fretwell* did not suggest that review of the well-established *Strickland* test was at issue. And Justice O'Connor, *Strickland*'s author, did not understand *Fretwell* to have announced a sea-change in the controlling test:

> Today's decision will, in the vast majority of cases, have no effect on the prejudice inquiry under *Strickland* v. *Washington*, 466 U.S. 668 (1984). The determinative question – whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694 – remains unchanged.

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to jury instruction that rendered defense a nullity); *Roe* v. *Delo*, 160 F.3d 416, 418-19 (8th Cir. 1998) (applying *Strickland* prejudice standard in finding ineffective assistance where counsel failed to request review of erroneous jury instruction on elements of first-degree murder); *Baldwin* v. *Johnson*, 152 F.3d 1304, 1311, 1315-17 (5th Cir. 1998) (applying *Strickland* prejudice standard in finding counsel's failure to, *inter alia*, request change of venue and challenge prosecutor's use of peremptory strikes as racially motivated not ineffective); *Harris* v. *Warden*, 152 F.3d 430, 440 (5th Cir. 1998) (applying *Strickland* prejudice standard in finding counsel's failure to object to erroneous jury instruction deficient, but not prejudicial); *Mazzell* v. *Evatt*, 88 F.3d 263, 269 (4th Cir. 1996) (applying *Strickland* prejudice standard in finding counsel's failure to object to jury instruction not ineffective even assuming deficient performance); *United States* v. *Pedigo*, 12 F.3d 618, 622-24 (7th Cir. 1994) (applying *Strickland* prejudice standard in finding counsel's failure to make dispositive motions, object to prosecutor's leading questions, and call corroborating witnesses not ineffective).

506 U.S. at 373 (O'Connor, J., concurring). Instead, the underlying facts of *Fretwell* make clear that the "fundamental unfairness" analysis is applicable only when necessary to prevent defendants from receiving unwarranted "windfalls."

Finally, affirming the Court of Appeals decision would demolish one of the pillars of the *Gideon* decision, namely that effective assistance of counsel is critical to the proper functioning of the adversary system. *Strickland* would be effectively overruled. The ability of courts to monitor representation in criminal cases in order to insure that defendants are competently represented would be severely compromised.

C. The Court of Appeals Erred in Concluding That Strickland Requires Petitioner To Show All Twelve Jurors Would Have Voted Against Imposition of the Death Penalty.

The Fourth Circuit also erred in construing out-of-context dicta from *Strickland* to contravene Virginia's death penalty sentencing law, which requires a unanimous jury to impose the death penalty. *See* Virginia Code § 19.2-264.4(E) ("In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.").

Although this Court has not required unanimity by juries imposing the death penalty, the Virginia legislature has enacted such a requirement as a fundamental tenet of its sentencing scheme. In determining whether the jury's verdict was rendered fundamentally unfair, the Fourth Circuit failed to pay proper deference to Virginia's unanimous sentencing requirement. The Fourth Circuit incorrectly stated that the findings of the Danville Circuit Court and the District Court that petitioner had proffered

sufficient evidence to show that one juror may have been swayed was insufficient as a matter of law to show prejudice. *See* 163 F.3d at 868 ("that one hypothetical juror might be swayed by a particular piece of evidence is insufficient"). This conclusion is simply incorrect under Virginia's death penalty statute, which provides that the death sentence may only be imposed by a unanimous jury, and conversely, that a single juror can – honestly and conscientiously – prevent the imposition of a death sentence.

Strickland requires that in assessing prejudice, the reviewing court must assume that "the judge or jury acted according to law." *Strickland*, 466 U.S. at 694. The law in Virginia is unambiguous: only a unanimous jury can impose a death sentence. The Fourth Circuit failed to correctly apply *Strickland* in suggesting otherwise. [15]

Moreover, the Fourth Circuit's decision is in conflict with the other courts that have addressed similar statutes and properly concluded that prejudice can be established by showing the effect on one juror. *See Kubat* v. *Thieret*, 867 F.2d 351, 371 (7th Cir. 1989); *Emerson* v. *Gramley*, 91 F.3d 898, 907 (7th Cir. 1996); *Mak* v. *Blodgett*, 970 F.2d 614, 621 (9th Cir. 1992). Finally, the Fourth Circuit's opinion contravenes core principles of federalism. Subject to minimum constitutional standards set forth by this Court, states are free to provide defendants with additional safeguards in the administration of the death penalty. *See*,

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[15] The passage of *Strickland* which the Fourth Circuit cites to support this proposition (that prejudice does "not depend on the idiosyncrasies of the particular decisionmaker") is clearly taken out of context. The passage from which this quote is drawn emphasizes the need in evaluating evidence to assume that the sentencer will act "according to the law . . . [and] must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." *Strickland*, 466 U.S. at 695. It does not – as the Fourth Circuit suggests – require a defendant to show that the missing evidence is so powerful that it would sway all twelve jurors.

e.g., *Mills* v. *Maryland*, 486 U.S. 367 (1988); *McCoy* v. *Court of Appeals of Wisconsin*, 486 U.S. 429 (1988). The Virginia legislature's requirement that the imposition of a death sentence be unanimous is one such additional safeguard sanctioned by this Court's longstanding precedent, but it was disregarded by the court below.

III. THE COURT OF APPEALS CONSTRUED 28 U.S.C. § 2254(d) IN AN UNCONSTITUTIONAL MANNER BECAUSE ARTICLE III PROHIBITS FEDERAL COURT DEFERENCE TO STATE COURT RULINGS ON FEDERAL LAW.

The Fourth Circuit's misinterpretation of the law was not limited to its analysis of *Strickland*. The court interpreted 28 U.S.C. § 2254(d)(1) in such a way as to preclude its independent review or enforcement of petitioner's Sixth Amendment right to effective counsel. The Fourth Circuit stated that "*habeas* relief is authorized only when the state courts have decided the question . . . in a manner that reasonable jurists would all agree is unreasonable." *Williams v. Taylor*, 163 F.3d at 865. *Amicus* submits that this interpretation of 28 U.S.C. § 2254(d)(1) – which requires federal courts considering *habeas* petitions to defer to state court interpretations of federal law – undermines the independence of our federal judiciary and thereby violates the most fundamental principles concerning the relationship between federal and state courts.[16]

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[16] In the past, the ABA has opposed the interpretation of Section 2254(d)(1) in an unconstitutional manner – most notably in an *amicus* brief filed in *Lindh* v. *Murphy*, 96 F.3d 856 (7th Cir. 1996) (*en banc*), *rev'd on unrelated grounds*, 521 U.S. 320 (1997). The ABA's *Lindh* brief contains a more complete exposition of the ABA's views on the constitutional problems raised by the Fourth Circuit's interpretation of Section 2254(d)(1).

This Court should interpret 28 U.S.C. § 2254(d)(1) in such a way to avoid the serious constitutional questions raised by the Fourth Circuit's interpretation. *See, e.g., Richardson v. United States*, 119 S.Ct. 1707, 1711 (1999) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question") (quoting *Gomez v. United States*, 490 U.S. 858, 864 (1989)).

A. The Judicial Power of the United States, Once Extended to a Proper Subject Matter, Must Be Exercised by Article III Courts.

Article III of the Constitution creates the "judicial Power of the United States," vests that power in the federal courts, and "extend[s]" it "to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States." U.S. Const. art. III, §§ 1, 2. From the early days of the Nation, this "judicial Power" has encompassed both the authority and the obligation to declare "what the law is." *See, e.g., United States* v. *Nixon*, 418 U.S. 683, 704-05 (1974). That fundamental principle was first articulated in *Marbury* v. *Madison*, 5 U.S. 137, 177-78 (1803):

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule .... This is of the very essence of judicial duty.

Martin v. *Hunter's Lessee*, 14 U.S. 304 (1816), made clear the supremacy of federal law over state law. Moreover, neither *Marbury* nor *Martin* suggested that the federal courts could discharge their constitutional duties by deferring to Congress' interpretation of the Constitution simply because

it might have been "reasonable" or not "contrary to . . . well established federal law." Rather, the federal courts are required to exercise independent judgment on the meaning of the applicable constitutional provision. *See* H. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 8-9 (1983).

This Court has rebuffed congressional efforts to intrude on its independent "judicial Power" – as it must to preserve our constitutional system. *See, e.g., Carlisle* v. *United States*, 517 U.S. 416, 426 (1996); *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218-25 (1995); *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 430 (1995); *United States* v. *Klein*, 80 U.S. 128, 145-47 (1871). This also has been the view of other federal courts examining this question. *See O'Brien* v. *Dubois*, 145 F.3d 16, 21 (1st Cir. 1998) ("If . . . a federal court must 'defer' to a state court's determinations anent federal law, ADEPA may intrude impermissibly upon the federal courts' Article III power not merely to rule on cases, but to decide them") (internal citation and punctuation omitted); *Lindh* v. *Murphy*, 96 F.3d 856, 872 (7th Cir. 1996) (*en banc*), *rev'd on other grounds*, 521 U.S. 320 (1997) ("Congress lacks power . . . to require federal judges to 'defer' to the interpretations reached by state courts."). *See also Pacemaker Diagnostic Clinic of America, Inc.* v. *Instromedix*, 725 F.2d 537, 544 (9th Cir. 1984) (*en banc*) ("If the essential, constitutional role of the judiciary is to be maintained, there must be both the appearance and the reality of control by Article III judges over the interpretation, declaration, and application of federal law.").

Given "the duty of the judicial department to say what the law is," *Marbury*, 5 U.S. at 177, a federal court that defers to a state court's decision as to "what the law is," performs "only rubber-stamp work," *Gutierrez de Martinez*, 515 U.S. at 429, and thus does not properly exercise its "judicial Power." In deferring to state court rulings of

federal law, the federal court may "rule on cases" but it surely is not "decid[ing] them," *see Plaut*, 514 U.S. at 218, in the essential matter or reaching an independent conclusion whether the *habeas* applicant is "in custody in violation of the Constitution or laws of the United States." *See Wright* v. *West*, 505 U.S. 277, 305 (1992) ("We have always held that federal courts, even on *habeas*, have an independent obligation to say what the law is.") (O'Connor, J., concurring).

These basic Article III principles lead inexorably to the conclusion that the Fourth Circuit's interpretation of Section 2254(d)(1) which precludes federal courts from exercising independent legal judgment in "say[ing] what the [federal] law is" in a *habeas* case violates Article III. *Marbury*, 5 U.S. at 177-78. Accordingly, the opinion below should be reversed.

B. Congress Cannot Preordain the Outcome of Cases Before Article III Courts.

This Court consistently has rejected similar efforts by Congress to dictate the outcome of adjudications in Article III Courts. *See, e.g., United States* v. *Klein*, 80 U.S. 128, 146-47 (1871) ("We are directed [by the statute] to dismiss the appeal, if we find that the judgment must be affirmed .... Congress has inadvertently passed the limit which separates the legislative from the judicial power. It is of vital importance that these powers be kept distinct."); *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 430 (1995) ("Congress may be free to establish a compensation scheme that operates without court participation .... But that is a matter quite different from instructing a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate..... We resist ascribing to Congress an intention to place courts in this untenable position"). *See also* L. Sager, *Constitutional Limitations on*

Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 88 (1981) (Congress may not require federal courts "to participate in an adjudicatory ritual, the end result of which would be the preordained defeat of the rights of constitutional claimants"). This Court should not sanction the Fourth Circuit's attempt to do so here.

CONCLUSION

For the reasons set forth herein, the ABA respectfully requests that the Court reverse the decision below.

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No. 98-8384

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TERRY WILLIAMS,

Petitioner,

—v.—

JOHN TAYLOR, Warden,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. This case involves the potential execution of a person who contends that he was denied effective assistance of counsel in state court and proper consideration of that claim in federal habeas corpus proceedings. It thus raises issues of fundamental importance to the ACLU and its members.

In order to focus our presentation, we limit this brief to the interpretation of 28 U.S.C. §2254(d)(1), newly enacted as part of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). The brief does not address constitutional considerations.

STATEMENT OF THE CASE

We adopt the petitioner's statement of the case, which explains that the validity of the circuit court's general interpretation of §2254(d)(1) is before the Court for evaluation.

SUMMARY OF ARGUMENT

In *Wright v. West*, 505 U.S. 277 (1992), this Court declined to embrace the view that a federal habeas court should give "deference" to a state court's application of fed-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

eral law to the facts of a specific case. *Id.* at 284 (plurality opinion announcing the judgment). At that time, Justice O'Connor found it significant that Congress had considered numerous bills that would have established such a "deferential standard of review" but had failed to enact any of them. *Id.* at 305 (O'Connor, J., concurring in the judgment). In this case, the circuit court below has interpreted §2254(d)(1) to be the very statute that was missing seven years ago.

The circuit court is mistaken. In the wake of *West*, Congress continued to debate the effect that a federal habeas court should give to a prior state court judgment. Specifically, Congress considered the Reagan and Bush Administrations' proposal to bar the federal courts from awarding habeas relief with respect to a claim that had been "fully and fairly" adjudicated in state court, as well as a proposal that would have explicitly barred federal courts from granting relief if a state court had reasonably applied federal law "to the facts" of a particular case. Yet, the proponents of those reform programs could not muster majority support in the Senate. Accordingly, Congress again refused to enact a general rule of deference to "reasonable" state court applications of law to fact, *i.e.*, state court determinations of "mixed" questions of law and fact. Instead, the Republican leadership compromised with members who preferred that habeas relief be more accessible. The statute that emerged, §2254(d)(1), abandoned proposals that would have established a general rule of deference to "reasonable" state court judgments on mixed questions in exchange for a codification of the *Teague* doctrine, a judicially crafted doctrine that the leadership wished to preserve from attack.

The circuit court explicitly declined to give the words that appear in §2254(d)(1) their ordinary meaning, particularly as those terms are used in the *Teague* cases. To the contrary, the circuit court insisted that §2254(d)(1) employs conventional terms in an unconventional way, drawing im-

probable distinctions among the kinds of cases that reach the federal habeas courts. Stripped of its metaphysical abstractions, the circuit court's approach produces one clear practical implication. According to the circuit court, virtually all cases covered by §2254(d)(1) are cases in which a prior state court decision arguably misapplied federal law to the facts of a particular case. The circuit court thus *forces* an extraordinary meaning upon §2254(d)(1): A federal court *cannot* grant habeas relief if a state court was *wrong* regarding a mixed question of law and fact; it can only do so if the state court was *unreasonably wrong*.

The circuit court apparently assumed that Congress meant to enact a general rule of deference to state court determinations of mixed questions. Proceeding from that premise, the circuit court simply imposed that meaning on §2254(d)(1). The circuit court's interpretation: (1) misapprehends the text of §2254(d)(1), both taken as a whole and according to its particular terms; (2) ignores other provisions of AEDPA enacted with §2254(d)(1), as well as adjacent statutes and doctrines with which §2254(d)(1) must be integrated; and (3) neglects the drafting sequence that led to the enactment of §2254(d)(1) as an alternative to earlier proposals.

If the text of this new statute is given its ordinary meaning, §2254(d)(1) plainly does *not* tell a federal habeas court that it must defer to a state court's application of federal law to the facts of a particular case. It tells a federal court that it cannot award relief on the basis of a change in the law. Properly construed, §2254(d)(1) codifies the choice of law rule announced in *Teague*: A federal court cannot award habeas relief simply because the court disagrees with a prior state court decision, but it should award habeas relief if a prior state court decision was erroneous in light of the federal principles that this Court would have applied at the time the state court acted.

ARGUMENT

I. THE TEXT OF §2254(d)(1) CODIFIES THE *TEAGUE* DOCTRINE

The first order of business is to interpret the precise text of the single sentence under examination:

> An application . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court . . . unless the adjudication . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

Taken as a whole, that sentence reaffirms two familiar principles: First, a state court decision regarding the merits of a federal claim is not erroneous merely because it differs from the decision that an inferior federal court would have reached. Inferior federal courts and state courts are co-equals; both answer only to this Court. If, then, a state court determines that a prisoner's claim is without merit and the prisoner turns to a federal habeas court later, the federal court is not entitled simply to substitute its own view of the merits for that of the state court and to award habeas relief on that basis. The federal court can grant relief only if the state court decision was erroneous in light of the authoritative "law" elaborated by this Court.[2]

Second, the purpose of federal habeas corpus is to ensure that state courts respect the principles of federal law that are in place when they determine federal claims. *Teague v. Lane*, 489 U.S. 288, 306 (1989). If, then, a state prisoner seeks federal habeas relief on the basis of a claim

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[2] *See* p.13, *infra*.

that the state courts rejected, the federal court can ordinarily award relief only if a judgment for the prisoner was compelled by the "law" that was "clearly established" at the time the prisoner's conviction became final -- namely, the "law" that this Court would have brought to bear if the prisoner's case had come here on direct review of his conviction.

The circuit court below proceeded on the assumption that §2254(d)(1) effects a radical change in the scope of federal habeas corpus for state prisoners. It dissected the single sentence in §2254(d)(1), construing each of its terms in isolation from the others. *Williams v. Taylor*, 163 F.3d 860, 865 (4th Cir. 1998); *Green v. French*, 143 F.3d 865, 868-74 (4th Cir. 1998).[3] That formalistic methodology operated as a self-fulfilling prophecy, producing precisely the result that the circuit court set out to achieve.

It is not true that the congressional proponents of §2254(d)(1) intended to adopt a general rule of deference to state court determinations of mixed questions.[4] Even more to the point, the circuit court is not entitled to enforce a statute that it *expected* Congress to enact or, certainly, a statute that the circuit court thinks Congress *should have enacted*. Only the statute that Congress actually placed on the books counts as law.

The circuit court candidly acknowledged that it read §2254(d)(1) to establish the "deferential standard of review" that Justice O'Connor found not to exist when *West* was decided.[5] But that is not what this new provision

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[3] The panel below accepted wholesale the construction of §2254(d)(1) that another panel of the same court had previously offered in *Green*.

[4] *See* Point III, *infra*.

[5] *West*, 505 U.S. at 303 (O'Connor, J., concurring in the judgment)(ex-
(continued...)

says.[6] By its explicit terms, §2254(d)(1) bars a federal court from awarding habeas relief if a state court previously rejected the claim in conformity to the law that was "clearly established" at the time.

The circuit court in this case explicitly resisted a construction of §2254(d)(1) that reflects the conventional understanding of federal habeas under the *Teague* doctrine. *See Green*, 143 F.3d at 873-74. Yet, §2254(d)(1) plainly instructs a federal habeas court to do precisely what *Teague* prescribes: If the respondent contends that the prisoner seeks federal relief on the basis of a claim that a state court properly rejected, the federal court must examine the precedents that existed at that time and determine whether those precedents compelled a different judgment. The federal court can grant habeas relief only if the state court decision against the prisoner was erroneous at the time it was rendered.[7]

Section 2254(d)(1) requires a federal habeas court to make as many as four determinations: (1) whether the state court decision was "contrary to" federal law; (2) whether the decision "involved an unreasonable application" of federal law; (3) whether the federal law in question was "clearly established"; and (4) if so, whether it was clearly established

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[5] (...continued)
plaining that *Teague* does not establish a deferential "standard of review" under which federal habeas courts examine state court determinations of mixed questions of federal law).

[6] *See Lindh v. Murphy*, 96 F.3d 856, 868 (7th Cir. 1996)(explaining that the term "deference" is nowhere to be found in this new provision), *rev'd on other gr'ds*, 521 U.S. 320 (1997). The conference report *did* use the term "deference," but in an entirely different way. *See* pp.25-26, *infra*.

[7] *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994).

"by the Supreme Court." The court below failed to grasp that those four inquiries are intimately connected. They jointly advance §2254(d)(1)'s function to identify a state court decision that a federal habeas court is entitled to reject as erroneous under *Teague*.

A. The "Contrary To" Formulation

According to the circuit court, a state court decision was "contrary to" law if it was in "square conflict" with a precedent of this Court that was "controlling as to law and fact." *Williams*, 163 F.3d at 865. If no such precedent existed, the court below presumes a state court decision was "contrary to" law only if it was "an objectively unreasonable" derivation of legal principles from this Court's "relevant" precedents. *Id.* Again, that is not what §2254(d)(1) says. The text of this new provision is sufficient to convey its own meaning and needs no judicially supplied exegesis. The "contrary to" formulation is a term of art, commonly understood to describe simple judicial error.[8]

The "contrary to" formulation in §2254(d)(1) thus allows a federal court to grant relief with respect to a claim, notwithstanding a prior state court adjudication on the merits -- if that state court adjudication produced an erroneous decision. Importantly, however, the state court decision must have been erroneous in light of "clearly established" law at the time it was rendered. The "contrary to" formulation thus explicitly incorporates the *Teague* doctrine -- namely, the established understanding that federal habeas courts should not surprise state courts by setting state prisoners free on the basis of changes in the law.[9]

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[8] *E.g.*, 28 U.S.C. §636(b)(1)A) (instructing district courts to review magistrate judge rulings to determine whether they are "contrary to law").

[9] The drafting sequence supports this interpretation. *See* p.28, *infra*.

B. The "Unreasonable Application" Formulation

The "contrary to" phrase is followed immediately in the same sentence by the "unreasonable application" phrase. The circuit court nonetheless broke that sentence down into two insular parts. By the circuit court's account, §2254(d)(1) describes two different ways in which a previous state court decision may be found wanting and prescribes different standards for a federal court to apply to each. Specifically, the circuit court read the "contrary to" formulation to apply only to the extraordinary case in which a state court decision rested either on a mistaken articulation of a "pure" legal rule or on a misapplication of a precedent set by this Court on the "identical" issue. *Green*, 143 F.3d at 870. The circuit court then read the "unreasonable application" formulation to establish an entirely independent test to be applied in all other cases -- cases in which a state court decision rested on an unreasonable "extension" of a legal rule, or a failure to apply a rule in a context in which it was reasonable that it should apply, or an unreasonable application of a legal rule to the facts of a particular case. *Id.* Once again, that is not what §2254(d)(1) says.

If the "contrary to" and "unreasonable application" formulations described entirely different ways in which state court decisions may be erroneous, they would appear under separate headings that would convey that meaning. They do not. Instead, they appear brigaded together in a single sentence. The most straightforward interpretation, then, is that they work in tandem to make a single point -- namely, that a federal court can grant relief in the face of a prior state court adjudication if (and only if) the state court made a serious mistake *either* in identifying the governing legal rule *or* in applying the proper rule in the instant case.[10]

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[10] The drafting history also supports this interpretation. *See* p.29, *infra*.

The circuit court acknowledged that the "contrary to" and "unreasonable application" formulations overlap with each other in "common legal parlance." *Green*, 143 F.3d at 869-70. But the circuit court nonetheless construed §2254(d)(1) to *defy* common usage -- invoking the canon that each term in a statute must be accorded an "independent" meaning. *Id.* at 870. That will not do. No canon obligates a court to pound common meaning out of statutory language.[11] When Congress employs familiar terms, the controlling canon is that those terms are to be given their conventional meaning.[12]

The circuit court's construction virtually reads the "contrary to" phrase out of §2254(d)(1). This Court does not sit to review state court decisions for error on a case-by-case basis. If the circuit court is right and §2254(d)(1) really *does* establish two different tests for state court decisions to pass in habeas cases, it is inconceivable that one of those tests (the "contrary to" test) should be virtually a null set -- capturing only cases in which a state court failed to articulate accurately a legal rule established by this Court or reached a decision in "square conflict" with an "all fours" precedent of this Court.

By contrast, the circuit court's construction converts the "unreasonable application" phrase into a grab bag containing all cases in which a state court decision may ordinarily be

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[11] The canon the circuit court purported to follow addresses a different kind of case -- where Congress uses distinctly different terms that, in a well-drafted statute, presumably carry distinct meaning. *Green*, 143 F.3d at 870. That canon does not insist that a court must break a single sentence down, word-by-word, and demand that each term must be assigned a meaning that is mutually exclusive of the meaning assigned to others. *Cf. Lindh v. Murphy*, 521 U.S. at 336 (finding it necessary to leave a statutory phrase in another section of AEDPA unaccounted for).

[12] *West Virginia Univ. Hosp. v. Casey*, 499 U.S. 83 (1991).

considered erroneous.[13] Initially, the circuit court put two quite different kinds of cases in that grab bag: (1) cases in which a state court decision rested on an unreasonable "extension" of a legal rule outside its proper purview, and (2) cases in which a state court decision rested on an unreasonable application of a legal rule to the facts of an individual case. *Green*, 143 F.3d at 870. Compounding that error, the circuit then inexplicably merged the two, first reading the unreasonable "extension" cases into the mixed question cases and then declaring that the "unreasonable application" category refers to cases in which a state court unreasonably applied a legal rule to the facts of an instant case. *Williams*, 163 F.3d at 865. That is not what §2254(d)(1) says.

The "unreasonable application" formulation *does* refer to unreasonable extension cases. The text is perfectly clear on that point, and the consequence is likewise clear: Here again, §2254(d)(1) employs terms that have a settled meaning in the *Teague* cases. When a habeas court extends a settled legal rule to a truly novel context, it does not merely misapply the rule to the facts of a particular case, but rather creates a new substantive rule.[14] That result is prohibited by both *Teague* and §2254(d)(1). On the other hand, when a state court upholds a conviction by extending an established rule of federal law beyond its proper purview, the state court has acted unreasonably and neither *Teague* nor §2254(d)(1) stands in the way of habeas relief.

It is equally important to recognize, however, that the "unreasonable application" formulation does *not* refer to mixed question cases. By its terms, §2254(d)(1) states only that federal relief must be withheld in light of a prior state court decision, unless that decision "involved" an unreasona-

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[13] For the drafting history, *see* p.29, *infra*.

[14] *Stringer v. Black*, 503 U.S. 222, 228 (1992).

ble "application" of federal law. Congress did not specify that an "application" must necessarily be an application of law *to the facts of a case*. It may seem plausible to read the term "application" to mean "application *to the facts*." But to do that, the circuit court itself supplied language that does not appear in the enacted statute.[15]

Here, too, the circuit court was at pains to impose on §2254(d)(1) a meaning that does not comport with *Teague*, notwithstanding the statute's use of *Teague* terminology. By merging extension cases with mixed question cases, the circuit court not only read an express reference to the *Teague* doctrine *out* of §2254(d)(1), but read *into* this new provision an idea that *Teague* and its progeny *reject*. *See Graham v. Collins*, 506 U.S. 461, 506 (1993)(Souter, J., dissenting)(explaining that one "general rule that has emerged under *Teague* is that application of existing precedent in a new factual setting will not amount to announcing a new rule").

Even if the "unreasonable application" formulation referred to a state court decision resting on an application of a legal rule to the facts, it would not follow that §2254(d)(1) distinguishes neatly between a state court decision resting on the identification of an abstract legal standard, on the one hand, and one resting on the application of a legal standard to the facts of a particular case, on the other. By its explicit terms, §2254(d)(1) instructs a federal court to withhold habeas relief in light of a prior state court "decision." A "decision" necessarily embraces both the state court's identification of the pertinent legal rule and the court's application of

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[15] This is one instance in which the drafting history is especially probative in that it demonstrates that the statute Congress enacted, §2254(d)(1), differs from an unsuccessful alternative precisely on this ground. *See* pp.29, *infra*.

that rule to the facts.[16] Section 2254(d)(1) merely employs two mutually reinforcing phrases (the "contrary to" and the "unreasonable application" formulations) to express the basic principle in *Teague*: A previous state court decision was not correct (enough) if it was reasonable; it was reasonable only if it was correct (in light of federal law as it stood at the time).[17]

The circuit court plainly went beyond the text of §2254(d)(1) when it insisted that a state court decision cannot constitute an "unreasonable application" of federal law unless the decision is one that "reasonable judges would all agree is unreasonable." *Williams*, 163 F.3d at 865. That is circular. Once a state court has rendered a decision rejecting a claim, it follows by hypothesis that "reasonable" jurists could take that position. They already have. By the circuit court's account, then, §2254(d)(1) would never permit federal habeas relief.[18]

C. The "Clearly Established Federal Law" Formulation

The circuit court acknowledged that the reference in §2254(d)(1) to state court departures from "clearly established" law reflects the *Teague* doctrine. *Green*, 143 F.3d at

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[16] A "decision" also encompasses a determination of the underlying facts. Yet, since 28 U.S.C. §2254(e) independently addresses the effects of a state court's findings of fact, a state court's "decision" for purposes of §2254(d)(1) must be limited to the judgment the state court made regarding the legal significance of the facts.

[17] *West*, 505 U.S. at 305 (O'Connor, J., concurring in the judgment).

[18] Section 2254(d)(1) contemplates that a state court "decision" must "involve" an unreasonable application of federal law. That focuses on the accuracy of a judicial *judgment* in the conventional way. The circuit court has it that federal relief can be granted only if state *judges themselves* are unreasonable.

873. That has to be right. The *Teague* doctrine asks a federal habeas court to evaluate the precedents that existed at the time a state court acted and to determine whether those precedents compelled a judgment favorable to the prisoner. That is the sense (and the only sense) in which §2254(d)(1) and *Teague* "validate reasonable, good-faith interpretations of existing precedents made by state courts . . . ." *Butler v. McKellar*, 494 U.S. 407, 414 (1990).

D. The "By The Supreme Court" Formulation

The circuit court read the phrase "by the Supreme Court" to mean that federal habeas relief is barred unless a prior state court decision departed from this Court's precedents. That is not what §2254(d)(1) says. Section 2254(d)(1) bars federal habeas relief if a prior state court decision departed from (clearly established) federal "law" as determined by this Court. The "law" this Court determines is found not only in the decisions this Court itself renders, but also in the decisions that other courts, federal and state, render in conformity with this Court's guidance.[19] Section 2254(d)(1) merely states that a state court's failure to follow precedents in the lower federal courts is insufficient to condemn its judgment as mistaken. A state court decision was erroneous only if it neglected federal *law* as it then stood -- *i.e.*, the law that this Court would have brought to bear, if the case had reached this Court on direct review of the state court decision.

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[19] The circuit court's contrary construction needlessly raises constitutional questions about §2254(d)(1) that the straightforward construction easily avoids. Article III judges at every level operate as independent jurists, not as agents of this Court. They are bound to make their best judgments about what federal law demands, and those judgments stand until they are overturned, either at the circuit level or in this Court. Congress cannot presume to prescribe the sources that federal judges can consult -- even if the statute specifies this Court's precedents *en masse*.

II. THE CONTEXT IN WHICH §2254(d)(1) OPERATES REINFORCES THE VIEW THAT IT CODIFIES *TEAGUE*

Section 2254(d)(1) must be read in the context provided by the other provisions with which it was adopted, and adjacent statutes and doctrines with which it must operate.

A. The Other Provisions In AEDPA

The bulk of AEDPA is devoted to reforms in the process by which the federal courts adjudicate habeas corpus cases. Those procedural adjustments plainly contemplate that a federal court may determine the merits of mixed questions. They would make no sense if, after a claim has cleared all procedural hurdles, §2254(d)(1) nonetheless forced the federal habeas court to rubber-stamp a previous state court application of federal law to the facts of a particular case.

Moreover, under an amendment to the pre-existing provision on the effect of state court factfinding, the new Act empowers a federal court to presume that state findings are correct. 28 U.S.C. §2254(e)(1). If §2254(d)(1) established a similar presumption in favor of state court decisions on mixed questions of law and fact, there would be no explanation for two separate sections.

B. Adjacent Statutes And Doctrines

The circuit court's construction of §2254(d)(1) fails to take proper account of related bodies of federal law that AEDPA leaves undisturbed. This single provision of the new Act does not sweep away all that preceded it, but rather presupposes the statutes and judicial decisions next to which it must take its place.

1. The *Teague* Doctrine

Obviously, §2254(d)(1) must be reconciled with

Teague. Two things are clear at the outset. One is that §2254(d)(1) operates in territory that *Teague* occupies. The other is that the two cannot function sequentially: Section 2254(d)(1) cannot take the *Teague* doctrine as it finds it and simply establish other questions for a federal court to answer after the court is satisfied that *Teague*, for its part, allows the court to proceed. The questions that *Teague* and §2254(d)(1) contemplate overlap too much to make any *seriatim* analysis a sensible exercise. The available possibilities are obvious enough. Section 2254(d)(1) either vanquishes *Teague* or folds *Teague* into its own regime. Only the latter possibility makes sense.[20]

The circuit court below resisted the relationship between §2254(d)(1) and *Teague* on three grounds: (1) §2254(d)(1) does not explicitly refer to the two *Teague* exceptions;[21] (2) it does not employ the "new rule" language used in *Teague*; and (3) it does not reach all the ground that *Teague* covers. *Green*, 143 F.3d at 873-74. None of those explanations survives scrutiny.

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[20] Congress often codifies doctrines that this Court has developed, particularly where habeas corpus is concerned. The statute that states the exhaustion doctrine, 28 U.S.C. §2254(b)-(c), is an illustration. *See* H.R. Rep. No. 308, 80th Cong., 1st Sess. A180 (1947)(explaining that "[t]his section is declaratory of existing law as affirmed by the Supreme Court"). What was formerly §2254(d) largely incorporated the standards this Court had previously developed for evidentiary hearings in *Townsend v. Sain*, 372 U.S. 293 (1963). *See La Vallee v. Delle Rose*, 410 U.S. 690 (1973). For evidence from legislative history that the current §2254(d)(1) codifies *Teague*, *see* pp.27-28, *infra*.

[21] This Court has recognized two exceptions to the general rule in *Teague* that "new rule" claims are unenforceable in federal habeas: (1) new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"; and (2) rules "without which the likelihood of an accurate conviction is seriously diminished." *See Teague*, 489 U.S. at 311, 313.

The circuit court is simply wrong on the first point. Section 2254(d)(1) does *not* jettison the *Teague* exceptions.[22] While §2254(d)(1) does not mention the exceptions explicitly, other provisions of AEDPA *do*.[23] The point of those provisions is to allow access to federal court when a prisoner advances a claim that depends on a "new rule" that fits one of the *Teague* exceptions and is therefore retroactively applicable. Here again, the circuit court refused to construe §2254(d)(1) in light of the other provisions with which it was enacted. In this instance, the circuit court managed to generate a construction that, if accepted, would render those other provisions unintelligible.

The court below was correct that §2254(d)(1) does not mention "new rules." But it hardly follows that this new provision cannot codify the *analysis* in *Teague*. Under the

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[22] If §2254(d)(1) *did* abolish the *Teague* exceptions, it would scarcely follow that this new provision cannot codify the baseline *Teague* rule from which those exceptions depart. It would only follow that Congress has decided that federal habeas relief should be barred in every case in which a previous state court adjudication of the merits reached a decision that was true to the law as it was when the state court acted, irrespective of the considerations that this Court has thought to warrant the enforcement of new rules retroactively. Of course, that policy would be subject to constitutional limitations.

[23] For example, §2244(b)(2)(A) (as amended) allows a prisoner to excuse a failure to raise a claim in a prior federal petition on the ground that the claim depends on a "new" rule that was "previously unavailable" but has been made "retroactive to cases on collateral review." *See* §2244(d)(1)(C) (as amended)(employing a similar test with respect to filing deadlines); §2254(e)(2)(A)(i) (as amended)(using the same test with respect to the development of facts in prior state proceedings); §2255 (as amended)(incorporating the same standard with respect to the filing deadlines for §2255 motions and also with respect to the acceptability of second or successive §2255 motions); §2264 (employing the same test with respect to the acceptability of claims that were not raised and decided on the merits in state court).

Teague doctrine, a state court is expected to have recognized a rule of federal law that was well established at the time the defendant's conviction became final. *Teague* does not contemplate that a state court judgment was correct merely because it was "reasonable." If, however, a state court reached a decision regarding a federal claim for which it was reasonable to rely on existing precedents, a federal habeas court coming to the claim later often can reach a different outcome only by creating a new rule of law. The *Teague* doctrine thus factors attention to a state court's reasonable understanding of extant precedent into the definition of what counts as a new rule. That is all that §2254(d)(1) says or means to say.

Likewise, the court below was correct that §2254(d)(1) addresses only cases in which a state court previously adjudicated the merits of a claim and does not deal explicitly with cases in which no such state court adjudication occurred.[24] The obvious illustration is a case in which the state court declined to consider a claim because the prisoner committed procedural default as a matter of state law.[25] If §2254(d)(1) fails to occupy the entire field in which *Teague* operates, however, it scarcely follows that this new statute must necessarily have an entirely different meaning and purpose, notwithstanding the many respects in which it plainly codifies *Teague*.

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[24] The circuit court assumed that *Teague* will continue to bar federal habeas relief when a prisoner advances a "new rule" claim, even when the custodian fails to prove a qualifying prior state court adjudication on the merits that defeats habeas relief under §2254(d)(1). That question is not presented in this case.

[25] The universe of cases that the circuit court had in mind is extremely small. The claims that §2254(d)(1) does not reach (for want of a state court adjudication on the merits) are almost always precluded on procedural grounds. *See Wainwright v. Sykes*, 433 U.S. 72 (1977).

The circuit court hinted at (but did not squarely take) the position that Congress cannot possibly have codified *Teague* in some instances (*i.e.*, in cases in which a state court previously determined the merits), but not in others (*e.g.*, default cases). That does not follow at all. A federal statute can easily establish a policy in one class of cases, while judicially crafted doctrine advances the same policy in a different, but related, class of cases. Arrangements of that kind are common, particularly where Congress and this Court have labored together to forge and enforce a uniform policy across a range of cases implicating similar federalism concerns. Habeas corpus is the preeminent illustration of a body of federal law that draws on both statutes and judicial decisions in the service of similar themes.[26]

The reason that §2254(d)(1) governs only cases in which a state court adjudicated the merits is apparent: The point this new provision makes is that a federal habeas court should not ignore a state court judgment regarding a federal claim when the state court has labored to arrive at a correct decision. If, however, the state court made no attempt to

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[26] Another example is the interplay between the Anti-Injunction Act, 28 U.S.C. §2283, and the *Younger* abstention doctrine. See *Younger v. Harris*, 401 U.S. 37 (1971). Since §2283 does not apply to a federal suit advancing a federal claim pursuant to 42 U.S.C. §1983, that statute does not bar a federal court from enjoining a pending state court suit in which the same federal claim is due to be determined. Nevertheless, the *Younger* doctrine does often bar such an injunction. This Court plainly has not thought that, in that context, the limited reach of a statute somehow affects the operation of similar judge-made doctrine in cases the statute does not itself control. Cases in which this Court has fashioned federal common law to complement federal statutory policy make the same point. *See D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 468-70 (1942)(Jackson, J., concurring)(explaining that statutes typically leave gaps that the courts must fill in to effectuate congressional policy).

adjudicate the merits (for whatever reason), there is no state court judgment on the claim for the federal court to acknowledge.[27]

2. Qualified Immunity

Not only did the circuit court fail to acknowledge the congruence between §2254(d)(1) and *Teague*, but it adopted a construction of the new statute that suggests a relationship between §2254(d)(1) and the quite different doctrine governing executive officers' immunity in actions for damages. No such relationship is tenable. Here again, the circuit court failed to work through the way §2254(d)(1) fits into the wider landscape.

It is true that this Court's decisions elaborating the qualified immunity doctrine also attach significance to departures from "clearly established" law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Yet, there the similarities end. This Court has never merged habeas corpus and qualified immunity, but rather has carefully kept them apart. Different considerations drive the two bodies of law. In habeas corpus, the Court has attended to "certain special

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[27] The drafting sequence also helps to explain why §2254(d)(1) is limited to cases in which a state court previously adjudicated the merits. The two competing reform proposals to which §2254(d)(1) responded both hoped to prescribe the effect a federal habeas court should give to such a prior state court adjudication. *See* pp.24-25, *infra*. When the proponents of AEDPA fashioned §2254(d)(1) as a less drastic alternative to those proposals, they naturally started with a model contemplating a previous state court decision and worked from there. Importantly, there is no general provision on procedural default in AEDPA. *Cf.* 28 U.S.C. §2254(e)(2) (dealing only with default regarding factfinding in state court). Clearly, then, the proponents of §2254(d)(1) did not have default cases in view. That undoubtedly accounts for their failure to build any reference to default cases into §2254(d)(1).

concerns" touching the availability of collateral relief from state judgments and has fashioned the *Teague* doctrine to strike the proper balance. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995). In the qualified immunity cases, the Court has addressed equally "special" (but different) "federal policy considerations" relating to civil suits for damages. *Id.*

The concern underlying qualified immunity doctrine is that executive officers may not perform their duties if they face the "specter of damages liability for judgment calls made in a legally uncertain environment." *Ryder v. United States*, 515 U.S. 177, 185 (1995). It is to deal with problems of that kind that the Court has created a "well-established, independent rule of law" that protects defendants from liability, unless they violated clearly established law. *Reynoldsville Casket*, 514 U.S. at 758.

In habeas corpus proceedings, by contrast, the state officers in question are judges who have the time, resources, and professional credentials to make reasoned judgments. State judges are not put on trial. Nor are they exposed to personal liability for their decisions. Indeed, they are not formally involved. The dispute with which the federal district court is concerned is between the petitioner and the custodian, who defends the prisoner's detention on the basis of what state judges have done and thus places their work under examination only indirectly.

These differences have important consequences when courts decide the level of generality at which a legal rule must be stated in order to rank as "clearly established." *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987). There is no more basis for invoking qualified immunity doctrine to shield state judicial judgments in federal habeas corpus cases than there would be for invoking that doctrine to insulate

any other ordinary, though perhaps defective, judicial decision from later appraisal.[28]

A construction of §2254(d)(1) that relies upon an analogy to qualified immunity would also conflict with this Court's interpretation of 42 U.S.C. §1983 -- another statute with which this new provision governing habeas relief must be reconciled. This Court has labored long and hard to make habeas corpus and §1983 actions compatible. In *Heck v. Humphrey*, 512 U.S. 477 (1994), for example, the Court held that a §1983 suit for damages is unavailable to a prisoner whose claim goes to the validity of a criminal judgment -- unless the prisoner first undermines that judgment by some other means, typically a habeas corpus action.

Heck envisions that a prisoner will initially seek and obtain a favorable decision in habeas (in which case qualified immunity will play no role). Then (and only then), the prisoner will be entitled to sue the offending state executive officer for damages (in which case that officer *will* be entitled to defend on the basis of immunity). If §2254(d)(1) were construed to incorporate the qualified immunity standard into the prisoner's habeas action in the first instance, *Heck* would no longer make sense. An issue that *Heck* reserved for the subsequent §1983 suit would be jammed into the previous habeas proceeding -- making the §1983 suit's treatment of it superfluous.

A serious contextual interpretation of §2254(d)(1) thus renders a sensible result: This new statute codifies the habeas corpus analysis this Court has fashioned (the *Teague* doctrine) and preserves the distinction this Court has drawn between the analysis appropriate in habeas cases, on the one

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[28] *Cf. Ryder*, 515 U.S. at 185-88 (adopting precisely this reasoning in rejecting an argument that a judgment rendered by unqualified military judges might be sustained by analogy to the qualified immunity cases).

hand, and the analysis appropriate in suits for damages, on the other. In a habeas case, the new statute requires a federal habeas court to decide whether a state court decision on a federal claim conformed to the law as it was when the state court acted. This Court's precedents under the heading of the *Teague* doctrine will provide a ready source of guidance for making that inquiry. The federal habeas court will conduct a conventional appraisal of the contemporaneous precedents and determine whether they were distinguishable from the prisoner's case in a meaningful way.[29] In a §1983 case in which a plaintiff seeks damages from an executive officer, by contrast, immunity doctrine will continue to hold the officer liable only for objectively unreasonable behavior that an officer should have known was unlawful.

III. THE DRAFTING SEQUENCE THAT PRODUCED §2254(d)(1) FORTIFIES THE UNDERSTANDING THAT IT CODIFIES *TEAGUE*

The circuit court below apparently proceeded from the erroneous premise that Congress meant §2254(d)(1) to instruct federal courts to defer to state court determinations of mixed questions. In fact, the drafting process that generated this new statute fortifies the interpretation that flows naturally from its enacted text: Section 2254(d)(1) codifies, and was meant to codify, the *Teague* doctrine.

Section 2254(d)(1) embodies a compromise solution to a controversy that raged for years. As Justice O'Connor explained in *West*, Congress had often considered legislative bills that would have required federal habeas courts to defer to previous state court judgments. Both the Reagan and Bush Administrations proposed that the federal courts

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[29] *See West*, 505 U.S. at 304 (O'Connor, J., concurring in the judgment).

should be barred from awarding habeas relief with respect to a claim that had been "fully and fairly adjudicated" previously in state court.[30] In an accompanying commentary, the Justice Department explained that a state adjudication would be "full and fair" in the sense of that bill if the state court's decision was "reasonable."[31]

Many Democrats (and some Republicans) opposed the "full and fair" program, because they thought it would circumscribe federal habeas. Some Democrats advanced alternative plans, which focused on the delays and procedural snarls in habeas litigation. Those bills not only failed to include the "full and fair" provision, but took aim at the *Teague* doctrine in an effort to make federal habeas relief more readily available.[32]

In the 104th Congress, which produced AEDPA, the Republican leadership hoped finally to muster the votes nec-

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[30] *See, e.g.*, S.2216, 97th Cong., 2d Sess. (1982); H.R.2709, 101st Cong., 2d Sess. (1989).

[31] Specifically, the Department said that a state court adjudication would be full and fair if: "(i) the claim at issue was actually considered and decided on the merits in state proceedings; (ii) the factual determination of the state court, the disposition resulting from its application of the law to the facts, and its view of the applicable rule of federal law were reasonable; (iii) the adjudication was consistent with the procedural requirements of federal law; and (iv) there is no new evidence of substantial importance which could not reasonably have been produced at the time of the state adjudication and no subsequent change of law of substantial importance has occurred." The Habeas Corpus Reform Act" of 1982: Hearings on S.2216 Before the Committee on the Judiciary, United States Senate, 97th Cong., 2d Sess., at 98 (1982).

[32] *E.g.*, H.R.5269, 101st Cong., 2d Sess. §1305 (1990)(defining a "new rule" as a "sharp break from precedent"). *See* H.R. Rep. No. 681, 101st Cong., 2d Sess, pt.1, at 126 (1990)(explaining that the "sharp break" definition was meant to disclaim this Court's more fluid definitions).

essary to enact reform legislation. There was substantial support for procedural measures to expedite habeas cases. But members who wished to establish a deferential standard of review still could not command a majority in the Senate. The leadership therefore discarded proposals of that nature and advanced a bill that would codify *Teague*, thus preserving a doctrine that most Republicans regarded as salutary.

The original "Contract with America" bill in the House contained only procedural measures and thus plainly relied on *Teague* to limit the occasions on which federal courts might award habeas relief.[33] During the debate on that bill, Representative Cox introduced an amendment that would have restricted the federal courts' authority to award habeas relief in much the manner of the "full and fair" proposal (as that proposal had been explained by the Justice Department in 1982):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was decided on the merits in State proceedings unless the adjudication of the claim -- (1) resulted in a decision that was based on an arbitrary or unreasonable interpretation of clearly established Federal law as articulated in the decisions of the Supreme Court of the United States; (2) resulted in a decision that was based on an arbitrary or unreasonable application *to the facts* of clearly established Federal law as articulated in the decisions of the Supreme Court of the United States; or (3) resulted in a decision that was based on an arbitrary or unreasonable de-

[33] H.R.3, 104th Cong., 1st Sess. (1994).

> termination of the facts in light of the evidence presented in the State proceeding.[34]

The House adopted the Cox amendment,[35] but the bill of which it was a part went no further.

The original bill in the Senate included the familiar "full and fair" provision.[36] But in light of the strong opposition to that idea, the floor manager, Senator Hatch, negotiated a compromise with Senator Specter, which substituted what is now §2254(d)(1) for the "full and fair" provision and, effectively, for the Cox amendment recently approved in the House.[37] The departures that the Hatch/Specter compromise made from those unsuccessful proposals became the basis for obtaining the support needed to pass general reform legislation. Those departures plainly made habeas relief more accessible than would have been the case under either the "full and fair" plan or the Cox amendment.[38] The means to that end was the codification of *Teague*.

Neither the Senate nor the House produced a committee report explaining §2254(d)(1). The conference report did use the term "deference" in its summary: "[The Act] requires deference to the determinations of state courts that

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[34] 141 Cong.Rec. H1424 (Feb. 8, 1995)(emphasis added).

[35] *Id.* at H1427.

[36] S.3, 104th Cong., 1st Sess. (1994).

[37] S.623, 104th Cong., 1st Sess. (1995). Senator Hatch explained the compromise on the floor. 141 Cong.Rec. S7597 (May 26, 1995).

[38] The compromise was incorporated into the Senate anti-terrorism bill, which won initial passage in 1995, S.735, 104th Cong., 1st Sess. (1995); 141 Cong.Rec. S7857 (June 7, 1995), and later was enacted as part of AEDPA.

are neither 'contrary to,' nor an 'unreasonable application of,' clearly established law."[39] Similarly, Senator Hatch explained on the floor that §2254(d)(1) would require federal courts to "defer" to state courts, "*if* they . . . properly applied Federal law."[40] Read in context, those references to "deference" contemplated that federal courts would decide for themselves whether state courts have "properly" applied the federal law that existed at the time they acted and, if so, would *then* acknowledge the state courts' work and would withhold federal habeas corpus relief.

At one point, Senator Kyl offered an amendment that would have provided that "an application" for the writ "shall not be entertained," unless state court opportunities are "inadequate or ineffective to test the legality of the person's detention."[41] Senator Hatch opposed that proposal because it would restrict federal jurisdiction to determine the merits of claims.[42] Hatch reiterated: "I believe there needs to be postconviction habeas corpus review."[43] The Kyl amendment was defeated by an overwhelming margin.[44]

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[39] House Conf. Rep. No. 518, 104th Cong., 2d Sess. 111, *reprinted in* 1996 U.S. Code & Admin. News 944.

[40] 142 Cong.Rec. S3447 (April 17, 1996)(emphasis added). Senator Specter explained §2254(d)(1) in much the same way: "*Unless it is unreasonable*, a State court's decision applying the law to the facts will be upheld." According to Senator Specter, §2254(d)(1) would leave federal courts with "sufficient discretion to ensure that convictions in State court have been obtained in conformity with the Constitution." *Id.* at S3472 (emphasis added).

[41] 141 Cong.Rec. S7829 (June 7, 1995)(emphasis added).

[42] *Id.* at S7835.

[43] *Id.* at S7836.

[44] *Id.* at S7828-35, S7849.

A. Endorsement Of *Teague*

Senator Hatch explained in committee that he and Senator Specter had departed from prior Republican initiatives. But he was adamant in his refusal to accept Democrats' proposals to open federal habeas more widely to "new rule" claims. In that vein, he declared explicitly that the compromise bill did "not retreat from the principles established by *Teague v. Lane* . . . ."[45] Later in those proceedings, Senator Thurmond ensured that everyone knew what was intended by §2254(d)(1). He asked the witnesses in no uncertain terms whether the bill would "codify the *Teague* doctrine."[46] In answer to that question, four state attorneys general (all proponents of the bill) responded that it would do precisely that.[47]

Still later, former Attorney General Katzenbach (who opposed the bill) asked why, if the idea was to codify *Teague*, §2254(d)(1) did not simply "restate" the *Teague* decision verbatim. Picking up on that, Senator Biden invited Mr. Katzenbach to say that §2254(d)(1) would actually jettison *Teague* and enact the "full and fair" proposal, after all. To that, however, Mr. Katzenbach answered that if *Teague*

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[45] Hearing on S.623 Before the Committee on the Judiciary, United States Senate, 104th Cong., 1st Sess., at 3 (1995).

[46] *Id.* at 71.

[47] Mr. Lungren of California: "I am satisfied . . . that it does." *Id.* Mr. Morales of Texas: "[W]e . . . have a position that is not dissimilar from that of General Lungren . . . ." *Id.* Ms. Norton of Colorado: "[I]t appears that the current State [sic] legislation does embody the gains that States have made in the U.S. Supreme Court, so I am satisfied." *Id.* Mr. Stenberg of Nebraska: "I think the point perhaps that you are making, Senator, is that in reforming habeas we should preserve those things that the U.S. Supreme Court has done to benefit this review process . . . and I think this bill appropriately does that as far as *Teague* is concerned." *Id.*

was to be abandoned, it would not be "accomplished by words" -- namely, the words of §2254(d)(1).[48]

B. The "Contrary To" Formulation

During the floor debates, Senator Biden protested that §2254(d)(1) would be satisfied if a state court behaved "reasonably -- not correctly, reasonably."[49] Senator Hatch rejected that characterization:

> I notice [that Senator Biden's] . . . poster says that Specter-Hatch requires Federal courts to defer to State courts in almost all cases, even if the State is wrong about the U.S. Constitution. *That is absolutely false*. [The standard now in §2254(d)(1)] is a wholly appropriate standard. It enables the Federal court to overturn State court positions that clearly contravene Federal law. *Indeed, this standard essentially gives the Federal court authority to review de novo whether the State court decided the claim in contravention of Federal law* . . . What does this mean? It means that if the State court reasonably applied Federal law, its decision must be upheld. Why is that a problematic standard? After all, Federal habeas review exists to correct fundamental defects in the law. If the State court has reasonably applied Federal law it is hard to say that a fundamental defect exists.[50]

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[48] *Id.* at 102.

[49] 141 Cong.Rec. S7843 (June 7, 1995).

[50] *Id.* at S7846-48 (emphasis added). The floor manager in the House, Representative Hyde, defended the compromise bill in much the same way. Responding to the dire predictions of some Democrats, Rep. Hyde

(continued...)

C. The "Unreasonable Application" Formulation

The link between the "contrary to" and the "unreasonable application" formulations was also quite clear. There were two principal differences between the Cox amendment in the House and §2254(d)(1), which ultimately passed in both bodies. First, the Cox amendment put state court decisions based on incorrect interpretations of law and state court decisions based on unreasonable applications of law in different categories, indicating that they were conceived to advance different ideas. In §2254(d)(1), by contrast, the "contrary to" and "unreasonable application" formulations appear together. To treat them as separate, the circuit court must impose the structure of the failed Cox amendment on the quite different structure of the statute that Congress actually enacted.

Second, the unsuccessful Cox amendment in the House referred to a state court's "unreasonable application" of clearly established law "to the facts." Section 2254(d)(1) dropped the phrase "to the facts." To read the "unreasonable application" formulation in §2254(d)(1) to refer to state court determinations of mixed questions, the circuit court must resuscitate language that failed to win approval in Congress.

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[50] (...continued)
said that, under §2254(d)(1), "the Federal judge always reviews the State court decision to see if it is in conformity with established Supreme Court precedence [sic], or if it [sic] has been misapplied." 142 Cong. Rec. H3602 (April 18, 1996). President Clinton placed the same interpretation on §2254(d)(1) when he signed AEDPA into law. Statement of the President, 1996 U.S. Code & Admin. News 961-1, at 961-3 (disclaiming the notion that §2254(d)(1) would prevent federal courts from bringing "their own independent judgment to bear on questions of law and mixed questions of law and fact").

CONCLUSION

For the reasons stated above, this Court should reject the view that §2254(d)(1) establishes a general rule of deference to state court determinations of mixed questions of law and fact, and thus should reverse the judgment of the United States Court of Appeals for the Fourth Circuit.

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IN THE SUPREME COURT OF THE UNITED STATES

TERRY WILLIAMS,
Petitioner,

v.

JOHN TAYLOR, Warden,
Sussex I State Prison,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted in support of petitioner Terry Williams. Written consents of the parties to the filing of this brief have been submitted to the Court.[1/]

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit organization whose membership is comprised of over 10,000 lawyers and 28,000 affiliate members representing every state. Members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts.

The NACDL is the only national bar organization working on behalf of public and private criminal defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

The NACDL views with grave concern the continuing erosion of the Sixth Amendment right to effective assistance of counsel, particularly in capital cases, where effective advocacy is essential. This case highlights two aspects of that erosion. First, a number of courts have misapplied the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), to deny

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[1/] As required by Rule 37.6 of this Court, *amicus curiae* submits the following statement: no party authored this brief in whole or in part; and no person or entity, other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

relief even to capital defendants whose trial counsel utterly failed to perform their constitutional role. Second, some courts have wrongly concluded that this Court's narrow decision in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), added a requirement of "unfairness" to the *Strickland* prejudice standard. These errors threaten to weaken further the already minimal representation that many capital defendants receive. We believe that the perspective of our members, who regularly represent capital defendants at trial, on appeal, and in collateral litigation, will be useful to the Court.

SUMMARY OF ARGUMENT

1. Every accused requires the "guiding hand of counsel" for his defense. *Powell v. Alabama*, 287 U.S. 45, 69 (1932). Persons charged with capital crimes--many of whom are poor, uneducated, and mentally ill or retarded--have a particularly acute need for counsel. That need is greatest during the penalty phase, when counsel's ability to discover and present mitigating evidence often makes the difference between a life sentence and the death penalty.

2. In applying the two-part standard for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), many courts--including the court of appeals in this case--fail to recognize the unique features of capital sentencing proceedings, including defense counsel's responsibility to present mitigating evidence and the sentencer's inherently subjective consideration of that evidence. To ensure that the Sixth Amendment guarantee of effective assistance of counsel has meaning at the penalty phase of capital cases, this Court should make clear that, for purposes of the *Strickland* prejudice requirement, a "reasonable probability" of a different outcome exists whenever defense counsel fails to present significant mitigating evidence without a sound tactical basis, at least in the absence of overwhelming aggravating evidence.

3. The court of appeals compounded its erroneous application of the *Strickland* prejudice requirement by holding that this Court's decision in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), added an additional hurdle for the defendant to surmount. According to the court of appeals, *Lockhart* requires a defendant alleging ineffective assistance of counsel to show *both* a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different, *and* that the result of the proceeding was unfair or unreliable. In fact, as Justice O'Connor's concurrence in *Fretwell* makes clear, that case addressed the narrow circumstances presented--counsel's failure to raise a legal point that had merit at the time of trial but had been overruled by the time of the habeas proceeding--and did not purport to heighten the burden of a capital defendant seeking to establish prejudice under *Strickland*. The court of appeals' interpretation of *Fretwell* threatens to weaken the protections of the Sixth Amendment and to undermine the reliability of capital sentencing proceedings.

ARGUMENT

I. THE IMPORTANCE OF COUNSEL TO A CAPITAL DEFENDANT.

The Sixth Amendment guarantees a criminal defendant "the Assistance of Counsel for his defence." U.S. Const. Amend. VI. This Court has repeatedly recognized that "[t]he right of an accused to counsel is beyond question a fundamental right." *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986). Lawyers are essential to persons accused of crimes "because they are the means through which the other rights of the person on trial are secured." *United States v. Cronic*, 466 U.S. 648, 653 (1984).

The Court has often emphasized the significance of counsel to criminal defendants. As it declared more than sixty-five years ago:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Powell v. Alabama, 287 U.S. 45, 69 (1932).

Every defendant requires "the guiding hand of counsel," but an accused facing the death penalty has a particularly acute need for an attorney's assistance. Capital defendants face the ultimate, irreversible penalty; they are often, in the words of *Powell*, "ignorant and illiterate" or of "feeble intellect"; they are generally poor; they are often despised; and they are almost invariably incarcerated. Lacking the tools with which to organize a defense, persons charged with capital crimes look to their attorneys more than any other group of defendants.

Counsel for the defendant in a death penalty case plays an especially critical role at the penalty phase. As this Court has repeatedly recognized, the Eighth and Fourteenth Amendments "require that the sentencer, in all but the rarest

kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original) (plurality opinion); *see, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982) (same). Mitigating evidence can cover a vast range of information about the defendant, including his family background and upbringing, his school performance, his contact with the juvenile justice system, any prior incarceration, and his mental health history. *E.g., Hitchcock v. Dugger*, 481 U.S. 393, 397-98 (1987) (defendant has right to have jury consider evidence of difficult childhood, family background, and capacity for rehabilitation); *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (defendant has right to present evidence of his good behavior in jail while awaiting trial); *Eddings*, 455 U.S. at 115 ("Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation.").

Only defense counsel can properly evaluate the significance of potential mitigation evidence, and only counsel can obtain and present that information. "Defense counsel . . . has both the opportunity and the duty to present potentially beneficial mitigating evidence and to attempt to convince the sentencer that notwithstanding the defendant's guilt, he or she is a person who should not die." Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 318 (1983). Counsel typically must discover potential mitigating factors through consultation with the defendant and a comprehensive investigation of his life; develop a trial strategy that integrates any guilt phase defenses with the mitigating factors; and implement that strategy at all stages of the trial, from voir dire through penalty phase closing arguments. *See id.* at 320-39 (discussing defense counsel's duties with respect to mitigation); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving*

Standard of Care, 1993 U. Ill. L. Rev. 323, 339-42, 360-65 (same). It is in light of the peculiarly heavy responsibilities of defense counsel at the penalty phase of a capital case that the court of appeals' decision in this case must be examined.

II. THE COURT OF APPEALS MISAPPLIED THE PREJUDICE PRONG OF *STRICKLAND*.

The Sixth Amendment does not merely guarantee counsel to persons charged with serious crimes; it requires the *effective* assistance of counsel. In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court resolved an extended judicial debate over the proper standard for determining whether a defendant's counsel provided effective assistance. The Court established a precise two-part requirement. First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Second, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Since *Strickland*, this Court has repeatedly applied its two-part standard in determining ineffectiveness claims. *See, e.g.*, *Kimmelman*, 477 U.S. at 375; *Darden v. Wainwright*, 477 U.S. 168 (1986); *Hill v. Lockhart*, 474 U.S. 52 (1985).

The *Strickland* ineffectiveness standard governs both capital and non-capital cases. In death penalty proceedings, however, that standard must be applied in light of the unique features of capital litigation. Thus, in determining whether "counsel's representation fell below an objective standard of reasonableness," 466 U.S. at 688, a court in a death penalty case must consider counsel's responsibilities with respect to the discovery and presentation of mitigating evidence. And in determining whether the defendant has established prejudice from counsel's errors--the issue that this case presents--a court

must take into account the extraordinarily personal nature of each juror's decision whether to vote for death and the subtle, possibly subconscious, effect on that decision that mitigating evidence may have. *See* Ivan K. Fong, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 Stan. L. Rev. 461, 486-89 (1987). As Professor Goodpaster observes, "The sentencer's ultimate decision [in a capital case] is based on innumerable constituent decisions regarding the weight and credibility of witnesses and evidence as well as on many intangible emotional, moral, and psychological factors," and thus "[t]he ultimate effect [of a failure to present mitigating evidence] on the sentencer's final decision is absolutely indeterminate and indeterminable." Goodpaster, *supra*, 58 N.Y.U. L. Rev. at 350-51; *see also* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835, 1864-65 (1994) ("It is impossible for reviewing courts to assess the difference that investigation into mitigating circumstances and the effective presentation of mitigating evidence might make on a jury's sentencing decision."); White, *supra*, 1993 U. Ill. L. Rev. at 333 n.57 ("Because of the nature of the capital sentencing decision, determining whether additional mitigating evidence would have altered the sentencer's decision is highly speculative.").

Because of the irreversible nature of the death penalty, *e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 328-30 (1985); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980), and the fact that "short of substituting a verdict of its own, there is no way for a reviewing court to determine what effect unpresented mitigating evidence might have had on the sentencer's decision," Goodpaster, *supra*, 58 N.Y.U. L. Rev. at 354, the *Strickland* prejudice requirement is generally satisfied whenever--as plainly occurred here--defense counsel fails to present significant mitigating evidence without a sound tactical basis, at least in the absence of truly overwhelming aggravating

evidence.[2/] Such an approach adheres to the balance struck in *Strickland* between finality and fairness, while taking into account the unique nature of the capital sentencing process.

Some courts since *Strickland* have misapplied its prejudice standard by condoning patently inexcusable failures by capital defense counsel to investigate and present mitigating evidence on the ground that there is no "reasonable probability" that the evidence would have affected the sentencing decision. In one case, for example, a court found no prejudice from defense counsel's reliance on a sentencing statute that had been held unconstitutional three years before trial because it improperly restricted mitigating evidence. The court found no prejudice even though the statute on which counsel erroneously relied effectively precluded consideration of the defendant's most powerful mitigation evidence, while the statute actually in effect expressly permitted consideration of that evidence. *Frey v. Fulcomer*, 974 F.2d 348, 359-68 (3d Cir. 1992); *see id.* at 369-72 (Cowen, J., dissenting). And in another case, a court found no prejudice from counsel's failure to present or argue compelling mitigation evidence, including the defendant's honorable military service, his church attendance, his other religious activities, and additional character evidence. *Messer v. Kemp*, 760 F.2d 1080, 1092 (11th Cir. 1985); *see id.* at 1096-97 (Johnson, J., dissenting). *See generally* Bright, *supra* (describing cases); Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 Harv.

[2/] *Strickland* itself involved a failure to present mitigation evidence at the penalty phase of a capital case. But the omitted mitigating evidence in that case was weak; the evidence conflicted with the penalty phase strategy that trial counsel adopted; and the aggravating evidence was overwhelming. *See* 466 U.S. at 699-700. Thus, *Strickland* represents the relatively rare case where a reviewing court can conclude with confidence that there is no "reasonable probability" that presentation of mitigating evidence would not have affected the outcome.

L. Rev. 1923, 1931-32 (1994) (same); Fong, *supra*, 39 Stan. L. Rev. at 477-79 (same). Although purporting to follow *Strickland*, these (and other) decisions have misapplied its prejudice standard by demanding overwhelming evidence, not simply a "reasonable probability," that the trial result would have been different.

The decision below represents a particularly stark example of an appellate court's evisceration of *Strickland* in the capital sentencing context. Despite trial counsel's failure to discover and present uniquely powerful mitigating evidence, and despite the conclusion of two experienced trial judges--one state and one federal--that counsel's dereliction was prejudicial under *Strickland*, appellate judges, far removed from any contact with jurors and the capital trial process, decided that "[t]he mitigation evidence that the prisoner says, in retrospect, his trial counsel should have discovered and offered barely would have altered the profile of this defendant that was presented to the jury." *Williams v. Taylor*, 163 F.3d 860, 868 (4th Cir. 1998). The Fourth Circuit's opinion omits any sustained analysis of the potential effect of that evidence on the jurors, as *Strickland* plainly requires, and--most critically--fails to recognize the inherently subjective and indeterminate nature of the capital sentencing process.[3/]

The court of appeals' decision and the other cases cited above underscore the need for this Court to explicate the application of the *Strickland* prejudice requirement to the penalty phase of capital proceedings. In particular, the Court

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[3/] The court of appeals compounded its misapplication of *Strickland* by holding that Williams could establish prejudice only by showing a reasonable probability that the mitigating evidence would have caused all twelve jurors to vote against death, even though, under the Virginia sentencing scheme, a single juror's vote against death would have required imposition of a life sentence. *See Williams*, 163 F.3d at 868.

should make plain, in accordance with *Lockett* and its progeny, that significant mitigating evidence--even evidence that an appellate judge might find unpersuasive--can cause a sentencer to impose a long term of years or life without parole, instead of concluding that death is the only appropriate sanction.

III. THE COURT OF APPEALS MISAPPLIED THIS COURT'S DECISION IN *FRETWELL*.

The court of appeals committed a second error in its prejudice inquiry: purporting to apply this Court's decision in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), it concluded that to establish prejudice from counsel's unprofessional performance, a defendant must show *both* a reasonable probability that, but for counsel's errors, the outcome would have been different, *and* that "the result of the proceeding was unfair or unreliable." *Williams*, 163 F.3d at 869. Other courts as well have interpreted *Fretwell* to heighten the showing that a defendant must make to establish prejudice. *See, e.g., Creel v. Johnson*, 162 F.3d 385, 395 (5th Cir. 1998), *cert. denied*, 1999 U.S. LEXIS 3734 (1999); *Holman v. Page*, 95 F.3d 481, 490-91 (7th Cir. 1996), *cert. denied*, 520 U.S. 1254 (1997); *Durrive v. United States*, 4 F.3d 548, 550-51 (7th Cir. 1993).

These cases misread *Fretwell*. Its rule arose from a peculiar setting: the defendant alleged that his counsel was ineffective for failing to make a sentencing argument based on a decision that had been overruled by the time the habeas petition was filed. In rejecting this claim, the Court applied its conclusion in *Nix v. Whiteside*, 475 U.S. 157 (1986), and *Strickland* that, "'in judging prejudice and the likelihood of a different outcome, [a] defendant has no entitlement to the luck of a lawless decisionmaker.'" *Fretwell*, 506 U.S. at 370 (quoting *Nix*, 475 U.S. at 175 (quoting *Strickland*, 466 U.S. at

695)).[4] The Court concluded that, under the circumstances, "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. . . . To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Id.* at 369-70. As Justice O'Connor recognized in her concurrence, *Fretwell* concerned "unusual circumstances" and did not purport to change the prejudice standard that *Strickland* established. *Id.* at 373-74 (O'Connor, J., concurring); *see, e.g.*, *Martin v. United States*, 109 F.3d 1177, 1180-82 (7th Cir.) (Rovner, J., dissenting from denial of rehearing en banc) (interpreting *Fretwell* in accordance with Justice O'Connor's concurrence), *cert. denied*, 522 U.S. 931 (1997); *Flores v. Demskie*, 11 F. Supp. 2d 299, 305-06 (S.D.N.Y. 1998) (same); *United States v. Calderon*, 864 F. Supp. 929, 932 n.7 (N.D. Cal. 1994) (same); *State v. Bowers*, 966 P.2d 1023, 1028 n.4 (Ariz. App. 1998) (same); *In re Avena*, 12 Cal. 4th 694, 739-40, 909 P.2d 1017, 1044-45 (1996) (Arabian, J., concurring) (same).

The narrow circumstances that produced the decision in *Fretwell* have no application here or in many of the other cases in which that decision has been applied. Petitioner does not seek "a windfall to which the law does not entitle him" or a decision based on "the luck of a lawless decisionmaker." Instead, he asserts that his counsel failed to present evidence to the jury that, under *Lockett* and its progeny, he had--and continues to have--a constitutional right to have it consider. *Strickland* squarely controls the ineffectiveness determination under these circumstances.

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[4] In *Nix*, the Court applied this principle to hold that a defendant did not suffer prejudice from his counsel's refusal to present perjured testimony. *See* 475 U.S. at 175-76.

Moreover, altering *Strickland* to require a showing of unfairness in addition to a reasonable probability of a different outcome produces at least two adverse effects. First, such an interpretation undermines the Sixth Amendment guarantee of effective assistance of counsel, which--as discussed above--has been weakened already through an insufficiently rigorous application of *Strickland*. Second, interpreting *Strickland* to permit a reviewing court to conclude that no "unfairness" occurred--and thus no Sixth Amendment violation has been established--despite counsel's errors that had a reasonable probability of affecting the outcome injects into the capital sentencing process the arbitrariness that this Court has endeavored to reduce. *See, e.g., California v. Ramos*, 463 U.S. 992, 998-99 (1983); *Beck*, 447 U.S. at 641; *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion). Except in the narrow circumstances identified in *Nix* and *Fretwell*, a proceeding must be considered "unfair" and "unreliable" whenever a defendant establishes defective performance and prejudice under *Strickland*. To permit judges to conclude otherwise, based on a cold record and an undefined notion of "unfairness," would produce precisely the element of caprice that *Fretwell* itself purports to eliminate.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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In The

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TERRY WILLIAMS,

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JOHN TAYLOR, Warden, Sussex I State Prison,

Respondent.

On A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

MOTION OF MARVIN E. FRANKEL, JAMES K. LOGAN, LAWRENCE W. PIERCE, GEORGE C. PRATT AND HAROLD R. TYLER FOR LEAVE TO APPEAR AS *AMICI CURIAE* AND BRIEF IN SUPPORT OF PETITIONER

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Movants Marvin E. Frankel, James K. Logan, Lawrence W. Pierce, George C. Pratt and Harold R. Tyler respectfully request leave to appear as *amici curiae* in this matter by filing a brief in support of the Petitioner. Movants file their brief herewith pursuant to Supreme Court Rule 37.3(b).

Movants have sought consent to their appearance as *amici curiae* from Petitioner Terry Williams and Respondent John B. Taylor, Warden of the Sussex I State Prison. Although Petitioner has consented, Respondent has denied consent.

Movants are five former Article III judges. Marvin E. Frankel sat on the United States District Court for the Southern District of New York from 1965 until 1978. James K. Logan sat on the United States Court of Appeals for the Tenth Circuit from 1977 until July 15, 1998. Lawrence W. Pierce sat on the United States District Court for the Southern District of New York from 1971 to 1981 and on the United States Court of Appeals for the Second Circuit from 1981 to 1995. George C. Pratt sat on the United States District Court for the Eastern District of New York from 1976 to 1982 and on the United States Court of Appeals for the Second Circuit from 1982 to 1995. Harold R. Tyler Jr. sat on the United States District Court for the Southern District of New York from 1962 to 1975.

During the course of their judicial careers, movants exercised in thousands of cases the judicial power described in Article III of the Constitution. Hundreds of those cases involved petitions for habeas corpus filed by individuals incarcerated by state governments. The

potential *amici* therefore have a great interest in ensuring that this Court adopts an interpretation of 28 U.S.C. § 2254(d)(1) that does not infringe on the independence and powers of the judicial department.

Movants have demonstrated their interest in the separation of powers questions raised by various interpretations of 28 U.S.C. § 2254(d)(1) by participating as *amici curiae* in the courts of appeal regarding this issue. For example, Marvin E. Frankel, James K. Logan, Lawrence W. Pierce, George C. Pratt, and Harold R. Tyler, Jr. have briefed this issue in their role as *amici curiae* before the Second Circuit in *Ramirez v. Senkowski*, No. 98-2625 (2d Cir., scheduled for argument June 24, 1999), and *Vasquez v. Strack*, No. 98-2590 (2d Cir., scheduled for argument June 24, 1999). Likewise, Marvin E. Frankel has briefed this issue in his role as *amicus curiae* before the United States Court of Appeals for the Seventh Circuit in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *rev'd*, 117 S. Ct. 2059 (1997).

This Court has granted certiorari with respect to, among other things, whether the Fourth Circuit's interpretation of the "contrary to" and "unreasonable application" clauses of 28 U.S.C. § 2254(d)(1) is correct. *Williams v. Taylor*, ___ U.S. ___, 119 S. Ct. 1355 (1999). In answering this question, this Court must examine the Constitution to avoid adopting an interpretation of section 2254 that would raise any question as to its constitutionality. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 465-66 (1989). In their brief, movants propose to address separation of powers issues raised by the Fourth Circuit's interpretation of those clauses. Their discussion is, therefore, of interest to this Court.

Movants also propose to argue that the "clearly established Federal law, as determined by the Supreme Court" clause of section 2254(d)(1) raises serious questions whether Congress has impinged on the province of the federal judiciary, in violation of Article III of the Constitution. They will argue that because the proper interpretation of this language does not bear on the outcome of the instant case, and because this Court should not address constitutional questions needlessly, *Edward J. DeBartolo Corp.*, 485 U.S. at 575 (discussing "the prudential concern that constitutional issues not be needlessly confronted"), this Court should defer rendering an interpretation of this language until the question is squarely presented. Movants' discussion of this issue is, therefore, of interest to the Court as well.

Based upon the above, movants respectfully request that the Court accept their brief for filing.

Respectfully submitted,

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ARGUMENT 5

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STATEMENT OF INTEREST[1]

Amici curiae are five former Article III judges. Marvin E. Frankel sat on the United States District Court for the Southern District of New York from 1965 until 1978. James K. Logan sat on the United States Court of Appeals for the Tenth Circuit from 1977 until July 15, 1998. Lawrence W. Pierce sat on the United States District Court for the Southern District of New York from 1971 to 1981 and on the United States Court of Appeals for the Second Circuit from 1981 to 1995. George C. Pratt sat on the United States District Court for the Eastern District of New York from 1976 to 1982 and on the United States Court of Appeals for the Second Circuit from 1982 to 1995. Harold R. Tyler, Jr. sat on the United States District Court for the Southern District of New York from 1962 to 1975.

During their judicial careers, *amici curiae* exercised "[t]he judicial Power," U.S. Const. art. III, § 1, in thousands of cases, including hundreds brought pursuant to 28 U.S.C. § 2254 and many others that presented questions concerning Congress' power to regulate the judicial department. For the reasons discussed below, *amici curiae* believe that the Fourth Circuit's interpretation of 28 U.S.C. § 2254(d)(1) raises serious separation of powers concerns, and that their prior experience, as well as their deep concern that the judiciary remain empowered to play the role Article III envisions, provide them with a

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[1] *Amici curiae* state, pursuant to Sup. Ct. R. 37.6, that this brief was not authored in any part by counsel for any party. Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C. made a monetary contribution to the preparation and submission of this brief.

unique perspective on this issue that could be of aid to the Court.

STATEMENT OF THE CASE

Amici curiae rely on the Statement of the Case submitted by Petitioner Terry Williams.

SUMMARY OF ARGUMENT

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996. Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"). Title I amends the existing habeas corpus statute, 28 U.S.C. § 2241 *et seq.*, and "works substantial changes" upon the federal authority to grant habeas petitions. *Felker v. Turpin*, 518 U.S. 651, 654 (1996). 28 U.S.C. § 2254(d)(1), which is at issue in this case, codifies for the first time a standard of adjudication for habeas corpus proceedings:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

This Court has granted certiorari with respect to the proper interpretation of the "contrary to" and "unreasonable application of" clauses of 28 U.S.C. § 2254(d)(1).

Williams v. Taylor, ___ U.S. ___, 119 S. Ct. 1355 (1999).[2] It has denied certiorari with respect to whether the Fourth Circuit's interpretation thereof violates the Constitution. *Id.* Nonetheless, in answering the question presented, this Court must examine the Constitution to avoid adopting an interpretation of section 2254 that would raise a question as to its constitutionality. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 465-66 (1989). This Court has held that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.") (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). This Court applies this principle not only when a statute would otherwise be unconstitutional but also when there exists "a serious doubt of constitutionality." *Public Citizen*, 491 U.S. at 465-66 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

This rule derives from the need for the separation of powers and for the consequent respect that the judicial branch must accord to the legislative branch: "This approach . . . recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp.*, 485 U.S. at 575; *see also* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103

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[2] The Court has also granted certiorari with respect to several questions regarding the standards for ineffective assistance of counsel claims, which this brief will not address.

Harv. L. Rev. 407, 469 (1989) (noting that this doctrine "is a natural outgrowth of the system of separation of powers [and] minimizes interbranch conflict"). Accordingly, this principle of statutory construction is of "cardinal" importance. *Public Citizen*, 491 U.S. at 465-66 (quoting *Crowell*, 285 U.S. at 62); *see also Edward J. DeBartolo Corp.*, 485 U.S. at 575 (calling this principle "beyond debate"); *Hooper*, 155 U.S. at 657 (calling this principle an "elementary rule").

As *amici curiae* discuss below in part II, the construction placed on the "unreasonable application" clause of section 2254(d)(1) by the Fourth Circuit in this and other cases poses difficult and troubling questions concerning whether Congress has encroached upon the essential constitutional prerogative of the federal courts to say what the law is and to effectuate their conclusions in a manner that preserves the supremacy of national law. *Amici curiae* therefore urge this Court to reject that interpretation in favor of a standard of review that achieves the goal of respecting state court decisions without incurring the unconstitutional consequence of impairing federal courts' independence. The "contrary to" clause of this provision, which allows for plenary review, is such a standard of review. *Amici curiae* therefore urge the Court to reject the Fourth Circuit's narrow holding regarding when this standard of review should be applied.

As set forth below in part III, the "clearly established by Federal law, as determined by the Supreme Court" clause of section 2254(d)(1) also raises serious questions whether Congress has impinged on the province of the federal judiciary, in violation of Article III of the Constitution. However, the proper interpretation of this language does not bear on the outcome of the instant case, because petitioner's claims rely on this Court's ruling in *Strickland v. Washington*, 466 U.S. 668 (1984). *See* Petition

for Certiorari at p. *i*. Therefore, in accordance with the principle that this Court should not address constitutional questions needlessly, *Edward J. DeBartolo Corp.*, 485 U.S. at 575 (discussing "the prudential concern that constitutional issues not be needlessly confronted"), *amici curiae* respectfully urge this Court to defer rendering an interpretation of this language until the question is squarely presented.

ARGUMENT

I. THE DOCTRINE OF SEPARATION OF POWERS AND THE NATURE OF THE JUDICIAL POWER DEMAND 1) THAT THE JUDICIAL DEPARTMENT BE THE SUPREME INTERPRETER OF THE CONSTITUTION, 2) THAT IT NOT BE PREVENTED FROM ADHERING TO PROPER INTERPRETATIONS OF THE CONSTITUTION, 3) THAT IT NOT BE REQUIRED TO GIVE ADVISORY OPINIONS, AND 4) THAT IT BE PERMITTED TO GIVE *STARE DECISIS* EFFECT TO ITS RULINGS ON ISSUES OF CONSTITUTIONAL LAW.

History and jurisprudence teach that our system of government – which preserves the right of political participation and the ability to exercise civil rights – is carefully crafted and fragile. The Framers "had lived under a form of government that permitted arbitrary governmental acts to go unchecked." *I.N.S. v. Chadha*, 462 U.S. 919, 959 (1983). They "lived among the ruins of a system of intermingled legislative and judicial powers . . . which after the Revolution had produced factional strife and partisan oppression." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217 (1995). Mindful of this experience, they created a government in which the natural tendency of each branch to exercise as much power as possible would balance and check the similar tendencies of every

other branch. *Id.*; *see also Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (recognizing that the Founders "viewed the principle of separation of powers as a vital check against tyranny").

"[T]he doctrine of separation of powers . . . is at the heart of our Constitution." *Buckley*, 424 U.S. at 119. As this Court has observed, it "was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787." *Id.* at 124. Thus, the Constitution created the legislative, executive and judicial departments "to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility." *Chadha*, 462 U.S. at 951. The Founders, as "practical statesmen, experienced in politics," *Buckley*, 424 U.S. at 121, recognized that "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Id.* A department oversteps its bounds, however, when it intrudes on the "functionally identifiable" power of another. *Chadha*, 462 U.S. at 951; *see also Plaut*, 514 U.S. at 228 ("Not favoritism, nor even corruption, but power is the object of the separation-of-powers prohibition.").

The Founders were particularly afraid of the unchecked power of the legislature – "the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." *Buckley*, 424 U.S. at 129; *see also Plaut*, 514 U.S. at 220-21 (listing post-revolutionary era bodies that "decried the increasing legislative interference with the private-law judgments of the courts"). James Madison warned of

> "the danger from legislative usurpations; which by assembling all power in the same hands,

> must lead to the same tyranny as is threatened by executive usurpations. . . . [I]t is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions.
>
> The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments."

Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 273-74 (1991) (quoting *The Federalist No. 48*, pp. 332-34 (J. Cooke ed. 1961)). This Court "has not hesitated," *Buckley*, 424 U.S. at 123, therefore, to strike down legislative acts that have impinged on the powers of the other branches. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997); *Plaut*, 514 U.S. 211; *Metropolitan Wash. Airports Auth.*, 501 U.S. 252; *Bowsher v. Synar*, 478 U.S. 714 (1986); *Chadha*, 462 U.S. 919; *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

Although the separation of powers is important to each of the three branches of government, it is critical for the judicial department, which must be careful to avoid even the impression that it has been influenced by political considerations. The judiciary, unlike the other two departments,

> cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the

> Nation's law means and to declare what it demands.

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 865 (1992). In order to maintain their legitimacy, both in fact and in the eyes of society, federal courts are careful to decide their cases in a manner that is logical and consistent. "[T]he Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation." *Id.* at 866. Deciding cases in a principled manner is thus essential to the legitimacy of the judicial department and, ultimately, to its survival.

Congressional incursions into the way in which the judicial department decides cases are, therefore, dangerous to the integrity of the judicial department. Article III, section I of the Constitution provides: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." This explicit allocation of power "serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government, . . . and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (internal citations and quotation marks omitted).

This Court laid out the contours of "the judicial Power" in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). In that case, Marbury requested the Court to issue a writ of mandamus against Secretary of State Madison, who had refused to deliver Marbury's commission as justice of the peace which the previous Secretary of State had signed and sealed. Section 13 of the Judiciary Act of 1789 bestowed original mandamus jurisdiction on this Court. Article III of the Constitution, however, gave the

Court original jurisdiction in only "one class of cases," which did not include mandamus, so section 13 was "not . . . warranted by the Constitution." *Id.* at 174-77.

This raised the famous question: "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?" *Id.* at 177. In answering this question, Chief Justice Marshall described the fundamental nature of the judicial power. "It is emphatically the province and duty of the judicial department to say what the law is" – to interpret the Constitution. *Id.* Congress cannot impinge on this duty by requiring Article III courts to ignore any part of the Constitution and to instead give effect to a contrary law:

> [I]f a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; *the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.*
>
> If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which both apply.

Id. at 178 (emphasis added).

This Court elaborated on the nature of the judicial power in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). In that case, a Confederate sympathizer – who had been granted a Presidential pardon restoring all rights of property to ex-Confederates who signed a loyalty oath – sued for the proceeds of property confiscated by the government during the Civil War. The Court of Claims had decided that such a pardon entitled the claimant to

payment for confiscated property. *See United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1869). Congress then passed a law making such pardons conclusive evidence that the bearer had aided in the rebellion which resulted in dismissal of the claim. If the Court of Claims had already ruled in the claimant's favor, the statute deprived this Court of appellate jurisdiction and directed dismissal of the case, thus denying the plaintiff relief. *Klein*, 80 U.S. (13 Wall.) at 133-34.

This Court held that this attempt to "prescribe rules of decision" violated the separation of powers in two ways. *Id.* at 147. First, it prohibited the Court from giving "the effect to evidence which, in its own judgment, such evidence should have," and directed the Court to "give [the evidence] an effect precisely the contrary." *Id.* As the Court explained:

> The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of the cause in a particular way?. . . . Congress has inadvertently passed the limit which separates the legislative from the judicial power.

Id. at 146-47. Second, it not only dictated the logical (or illogical) processes the Court should follow, but it did so as a means to an end:

> We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?

Id. at 146. Taken together, *Marbury* and *Klein* and their progeny describe four characteristics of the judicial power upon which Congress cannot impinge.

A. Once Congress Grants Article III Courts Jurisdiction to Decide a Case, It Cannot Impair the Courts' Ability to Interpret and Independently Supply the Full Meaning of the Constitution.

As noted above, declaring the meaning of federal law "is the very essence of judicial duty." *Marbury*, 5 U.S. (1 Cranch) at 178. "When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is." *Flores*, 117 S. Ct. at 2172. Thus, it is firmly established that neither Congress nor non-Article III courts can interfere with the exercise of this power by overturning a federal court's interpretation of the Constitution.[3] *Id.* (defeating an attempt by Congress to overrule an Article III court's interpretation of the Constitution); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (defeating a similar attempt by a state court).

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[3] Of course, Congress can correct the judiciary's reading of federal statutes. *See, e.g.*, Civil Rights Act of 1991, 42 U.S.C. § 2000e-2 (amending Title VII of the Civil Rights Act of 1964 in response to this Court's opinion in *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989)). But Congress' only remedy when it disagrees with the judiciary's constitutional jurisprudence is to seek to amend the Constitution. *See Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431-32 (1855) (distinguishing between public rights, over which Congress has plenary authority, and private rights, over which Congress does not have authority); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) (noting that in the realm of statutory interpretation, "unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done").

Although Congress need not grant jurisdiction to the lower Article III courts, once it does so, "*Marbury* indicates that the court's interpretational duty is that of supplying the full meaning of the relevant constitutional provisions."[4] Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 6 (1983). Accordingly, this Court repeatedly has recognized a constitutionally crucial difference between withdrawing jurisdiction entirely and granting jurisdiction but forbidding its independent exercise. *See, e.g., Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 430 (1995) ("Congress may be free to establish a . . . scheme that operates without court participation" but may not "instruct[ ] a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate."); *Plaut*, 514 U.S. at 219-23; *Klein*, 80 U.S. (13 Wall.) at 145-47; *Yakus v. United States*, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting) ("It is one thing for Congress to withhold jurisdiction. It

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[4] Congress has always placed strict limits on when federal courts have jurisdiction to review, and thus deny effect to, state court decisions that violate federal law. *See, e.g.*, Full Faith and Credit Act, Act of May 26, 1790, ch. 11, 1 Stat. 122; Anti-Injunction Act, Act of March 2, 1793, ch. 23, § 5, 1 Stat. 333, 334-35. These doctrines exercise a quantitative Congressional power to confer jurisdiction, not a qualitative congressional power to determine the manner in which judicial power is exercised. James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696, 779-82 (1998). In contrast, Congressional control of the quality of judicial decisionmaking was rejected as early as the Constitutional Convention, where the delegates soundly defeated a motion to insert into Article III a provision that "the judicial power shall be exercised in such manner as the Legislature shall direct." 1 *The Records of the Federal Convention of 1787* 425, 431 (Max Farrand ed., 1911) (Aug. 27, 1787) (hereinafter "Farrand").

is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements. . . . [W]henever the judicial power is called into play, [the Court] is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it."). Whether addressing pure legal issues or mixed questions of law and fact, the judicial power, therefore, requires

> independent judgment, not deference, when the decisive issue turns on the meaning of the constitutional text. . . . There is no half-way position in constitutional cases; so long as it is directed to decide the case, an article III court cannot be "jurisdictionally" shut off from full consideration of the substantive constitutional issues.

Monaghan, *supra*, at 9, 11.

> In particular, this Court has never
>
> held in the past that federal courts must presume the correctness of state court legal conclusions . . . or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have the independent obligation to say what the law is.

Wright v. West, 505 U.S. 277, 305 (1992) (O'Connor, J., concurring). Thus, when Congress grants an Article III court jurisdiction to review another tribunal's decision regarding an issue of constitutional law, the latter's "declaration or finding is necessarily subject to independent judicial review upon the facts and the law . . . to the end that the Constitution as the supreme law of the land be maintained." *St. Joseph's Stock Yards Co. v. United States*, 298 U.S. 38, 51-52 (1936). A federal judge, therefore, " 'may not defer to [state court] findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently.' " *Wright*,

505 U.S. at 301 (O'Connor, J., concurring) (quoting *Townsend v. Sain*, 372 U.S. 293, 318 (1963)); *see also Miller v. Fenton*, 474 U.S. 104, 110 (1985). "If the essential, constitutional role of the judiciary is to be maintained, there must be both the appearance and the reality of control by Article III judges over the interpretation, declaration, and application of federal law." *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir. 1984) (en banc) (Kennedy, J.).

B. Congress Cannot Prevent the Lower Federal Courts from Applying the Entire Body of Constitutional Law to Cases Before Them.

As this Court ruled in *Marbury*, Congress *cannot* prevent federal judges from applying the entire body of federal law, and especially the Constitution, to cases over which they have been given jurisdiction. Faced with the question whether a statute that violated the Constitution could bind the federal courts, Chief Justice Marshall ruled that the judicial department had the power to determine "which of these conflicting rules governs the case." 5 U.S. (1 Cranch) at 178. The Court expressly rejected the claim by "[t]hose . . . who controvert the principle that the constitution is to be considered, in court, as a paramount law, . . . that courts must close their eyes on the constitution, and see only the law." *Id.* at 177-78. The dilemma, as Marshall construed it, is that a case "arising under the constitution [cannot] be decided without examining the instrument under which it arises. . . . In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what parts of it are they forbidden to read, or to obey?" *Id.* at 179. The question suggests the only appropriate answer: none.

C. Congress Cannot Constitutionally Render Decisions Advisory by Stripping the Federal Courts of Their Power to Decide Cases and Effectuate Their Decisions.

The "framers crafted th[e] charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy – with an understanding, in short, that . . . a 'judicial Power' is one to render dispositive judgments." *Plaut*, 514 U.S. at 218-19. Once it has granted jurisdiction to decide a case, Congress may not withhold from the federal courts the power to effectuate their independent judgments and make them binding on the parties, which is "an essential part of . . . the exercis[e of] judicial power." *Gordon v. United States*, 117 U.S. 697, 702 (decided 1864, reported 1885). A power characterized by judicial decisions which are "inoperative and nugatory . . . without any operations upon the rights of the parties . . . is not the judicial power." *Id.*

Accordingly, Article III forbids Congress to grant a federal habeas court jurisdiction to review a state court legal decision and then require the court to defer to the state decision. Whatever else may be true of Congress' ability to limit judicial remedies, it has been clear for well over a century that Congress cannot grant Article III courts jurisdiction to decide a case and then force them to surrender that jurisdiction at the moment the federal courts' independent interpretation of supreme law calls for relief sufficient to nullify state decisional law in conflict with supreme national law. *Klein*, 80 U.S. (13 Wall.) at 145-47. Congress cannot, therefore, enlist federal courts to scrutinize state decisions for consistency with the Constitution and then require them to leave in force and effect

what they have independently determined to be in conflict with the "supreme Law of the Land." U.S. Const. art. VI, § 2. No precedent exists allowing federal courts to give effect to state decisional law which they have independently determined is inconsistent with the supreme law of the land. Indeed, such a rule would both corrupt and trivialize "the judicial Power" by deeming constitutionally sufficient a role for federal judges which is beyond the judicial power: the giving of advisory opinions.[5] *United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) (holding that federal courts lack the power to render advisory opinions).

D. Congress Cannot Prevent the Lower Federal Courts from Adhering to Stare Decisis.

These three rules discussed above, all based upon the fundamental principle of separation of powers, do not exhaust all possible breaches thereof. "Violations of the separation-of-powers principle have been uncommon because each branch has traditionally respected the prerogatives of the other two. Nevertheless, the Court has been sensitive to its responsibility to enforce the principle when necessary." *Metropolitan Wash. Airports Auth.*, 501 U.S. at 272. Thus, in *Plaut*, this Court acknowledged that apart from the statute at issue, it knew "of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation," 514

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[5] The roots of the prohibition on advisory opinions run deep. For example, the Constitutional Convention rejected proposals that the Supreme Court provide opinions "upon important questions of law, and upon solemn occasions" at the request of the President or Congress. 2 Farrand, at 367 (Aug. 22, 1787).

U.S. at 230, but it nonetheless held that such an attempt "offend[ed] a postulate of Article III just as deeply rooted in our law" as those previously developed by the Court. *Id.* at 218.

A Congressional attempt to undermine the *stare decisis* effect of rulings on constitutional issues by lower Article III judges would be a similarly offensive breach of the separation of powers. *Stare decisis* is "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). Because *stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and fact," *id.* at 265-66, it is essential to the legitimacy of the judicial department. *See generally Planned Parenthood of Southeastern Pa.*, 505 U.S. at 866. As Justice Thurgood Marshall warned, "*Stare decisis* should be more than a fine-sounding phrase. This is especially true for us, because unless we respect the decisions of this Court, we can hardly expect that others will do so." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 599 (1977) (Marshall, J., dissenting).

Stare decisis is particularly important with respect to the rulings by Article III judges regarding issues of constitutional interpretation. Because the federal judiciary is charged with the primary responsibility to interpret the Constitution, once it has done so Congress cannot alter or correct that interpretation. *See* discussion *supra* part I.A. Nor, therefore, ought Congress be able to rob the constitutional holdings of the federal judiciary of their *stare decisis* effect:

> When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it

> must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.

Flores, 117 S. Ct. at 2172.

Congress recently tested this principle by passing the Religious Freedom Restoration Act ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488, in an attempt to expand the religious freedom protections of the First Amendment beyond the limits established by this Court in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). Recognizing that Congress was attempting to deprive *Smith* of its *stare decisis* effect and to take from the federal judiciary its ability to have the final word regarding the meaning of the Constitution, this Court struck RFRA down as violative of Article III, warning: "[A]s the provisions of the federal statute here invoked are beyond Congressional authority, it is this Court's precedent, not RFRA, which must control." *Flores*, 117 S. Ct. at 2172.

Congress' inability to rob the holdings of federal courts on constitutional matters of their *stare decisis* effect extends to holdings of circuit courts, which have *stare decisis* effect, subject only to overruling by the circuit en banc and by this Court. *Kremer v. Chemical Constr. Corp.*, 623 F.2d 786, 788 (2d Cir. 1980), *aff'd*, 456 U.S. 461 (1982). As this Court recently ruled, the Constitution "gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy." *Plaut*, 514 U.S. at 218-19; *see also id.* at 227 (emphasizing that Article III creates "not a batch of unconnected courts, but a judicial department composed of 'inferior Courts' and 'one supreme Court' "). Thus, although this Court has never before been faced with precisely this question, it is manifest that any attempt by Congress to lift the *stare decisis*

effect of circuit courts' constitutional rulings would violate the separation of powers doctrine.

II. THE COURT SHOULD AVOID AN INTERPRETATION OF THE "UNREASONABLE APPLICATION" CLAUSE OF SECTION 2254(d)(1) THAT WOULD IMPAIR "THE JUDICIAL POWER."

Under the plain language of 28 U.S.C. § 2254(d)(1), in reviewing a claim that was decided on its merits in a state court, a federal court must focus its review on the state court "decision," and shall grant habeas relief only when the state court decision "was contrary to" or "involved an unreasonable application" of clearly established Federal law. In this and other cases, the Fourth Circuit has limited use of plenary review under the "contrary to" clause to cases with indistinguishable facts and identical legal issues. *Williams v. Taylor*, 163 F.3d 860, 866 (4th Cir. 1998), *cert. granted*, ___ U.S. ___, 119 S. Ct. 1355 (1999); *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 844 (1999). Under this interpretation, virtually all claims will be analyzed under the "unreasonable application" clause. Other circuits have proffered interpretations of this clause which would permit more cases to be reviewed under this standard. *See, e.g., Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 888-89 (3d Cir. 1999); *O'Brien v. Dubois*, 145 F.3d 16, 24-25 (1st Cir. 1998). These interpretations are more faithful to the clear language of the statute. Moreover, review under the "contrary to" clause is plenary and thus avoids raising the constitutional questions discussed herein.

In violation of the settled separation of powers principles discussed above, the Fourth Circuit has interpreted section 2254(d)(1) to hold that Congress requires federal courts to defer to state court decisions. Under this

interpretation, "habeas relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable." *Green*, 143 F.3d at 870.

Although the Fifth, Seventh and Eleventh Circuits have adhered to similar standards of review, *see Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996); *Lindh v. Murphy*, 96 F.3d 856, 870 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997); *Neelly v. Nagle*, 138 F.3d 917, 924 (11th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 811 (1999), other circuits have criticized this interpretation as requiring federal courts to grant too much deference to state court rulings on issues of constitutional law. *O'Brien*, 145 F.3d at 25 (criticizing the Fourth Circuit's interpretation as "too deferential . . . [g]iven that reasonable judges occasionally make unreasonable decisions"); *Matteo*, 171 F.3d at 889 (rejecting the approach of the Fourth Circuit because it "unduly discourages the granting of relief insofar as it requires the federal habeas court to hold that the state court judges acted in a way that no reasonable jurists would under the circumstances," and noting that this approach "has the tendency to focus attention on the reasonableness of the jurists rather than the merits of the decision itself"). Unfortunately, the First Circuit's approach falls into the very error that it criticizes. *See Matteo*, 171 F.3d at 889 (noting of the First Circuit's "outside the universe of plausible, credible outcomes" standard that "its effect would be to render the 'unreasonable application' clause a virtual nullity, as granting habeas relief would require an explicit finding that the state court decision – often, a decision of the state's highest court – was so far off the mark as to suggest judicial incompetence"). Attempting to avoid this

error, the Third Circuit has held that a state court decision is an "unreasonable application" if the "state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." *Id.* at 890.

As is clear from this discussion, in developing standards of review under the "unreasonable application" clause of 28 U.S.C. § 2254(d)(1), the "crux of the debate has been what degree of deference, if any, AEDPA requires a federal habeas court to accord a state court's construction of federal constitutional issues and interpretation of Supreme Court precedent." *Id.* at 885. The federal courts' duty to preserve the supremacy of federal law proscribes deference:

> A policy of sweeping deference would permit, "[i]n the absence of any significant difference in the facts," "the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." Such varied results would be inconsistent with the idea of a unitary system of law.

Ornelas v. United States, 517 U.S. 690, 697 (1996) (citation omitted). Once a federal court is directed to decide a case, it has an independent obligation to declare the law and cannot defer to an erroneous state court decision. *See* discussion *supra* at 13-14. Any limitation on this obligation interferes with the constitutional function of the federal courts to give meaning to constitutional principles. Congress cannot, therefore, through section 2254(d)(1) constitutionally require federal courts to defer to a state court's erroneous determination of federal law.

The Fourth and Seventh Circuits have wrongly argued that their construction of the "unreasonable application" clause of section 2254(d)(1) escapes the constitutional error of limiting federal courts' ability to

independently interpret the Constitution because federal courts "are free, if [they] choose, to decide whether a habeas petitioner's conviction and sentence violate any constitutional rights. Section 2254(d) only places an additional restriction upon the scope of the habeas remedy in certain circumstances." *Green*, 143 F.3d at 875 (citing *Lindh*, 96 F.3d at 872). Under such an interpretation of section 2254(d)(1), however, federal courts are enlisted to do precisely what *Klein* forbids: scrutinize state legal decisions for consistency with the Constitution, then leave in force and effect that which they have independently determined to be in conflict with the "supreme Law of the Land." U.S. Const. art. VI, § 2. The independence of federal courts is not preserved simply because they "are free to express an independent opinion on all legal issues in the case." *Lindh*, 96 F.3d at 869. On the contrary, limiting the authority of federal courts to the mere expression of an independent opinion renders their opinions unconstitutionally advisory. *See* discussion *supra* part I.C.

The Fourth and Seventh Circuits have also concluded incorrectly that their interpretations of section 2254(d) place no greater constraint on federal judges than do other accepted doctrines such as limitations on federal court jurisdiction, deference to administrative interpretations, qualified immunity, and the rule of *Teague v. Lane*, 489 U.S. 288 (1989). *See Lindh*, 96 F.3d at 871-73; *Green*, 143 F.3d at 875. None of these doctrines, however, impugns federal judges' power "not merely to rule on cases, but to decide them. . . . " *Plaut*, 514 U.S. at 218-19. As noted above, in the Full Faith and Credit and Anti-Injunction Acts Congress has exercised a quantitative power to determine the extent of jurisdiction and not, as here, a qualitative power to control the manner in which the judicial power is exercised. *See* discussion *supra* at 12 n.4.

The doctrine of deference in administrative law identifies situations in which Congress delegates to an agency the task of defining statutory terms. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, the federal court independently decides whether the agency has acted within a statutorily delegated power to make supplementary law and, if so, the court complies with the statutory command to treat the law supplied by the delegate of Congress as it treats the law supplied by Congress itself. The same analysis applies to the "political question" doctrine, except that the Article III court must independently interpret the Constitution itself to see whether it gives Congress the duty to define an ambiguous constitutional provision. *See* Herbert Weschler, *Toward National Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 7-8 (1959). In neither of these contexts is the independent judgment of the federal courts impaired.

Moreover, the rule of *Teague* does not "establish a disjunction between the meaning of the Constitution and the use of habeas corpus." *Lindh*, 96 F.3d at 872. Indeed, *Teague* comports with the federal courts' essential supremacy-maintaining function by employing plenary federal review to insure that the state court, in accordance with its Supremacy Clause obligations, " 'appl[ied] the constitutional standards that prevailed at the time the original proceedings took place.' " *Teague*, 489 U.S. at 306 (quoting *Desist v. United States*, 394 U.S. 244, 263 (1969)); *see also Saffle v. Parks*, 494 U.S. 484, 488 (1990) (holding that the "foremost" purpose of habeas "is ensuring that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of the proceedings"); *Wright*, 505 U.S. at 307 (Kennedy, J., concurring) (noting that the relevant question in a habeas proceeding is whether a conviction "was obtained in

accordance with the constitutional interpretations existing at the time of the prisoner's conviction"); *id.* at 304 (O'Connor, J., concurring) ("*Teague* simply requires that a state conviction on federal habeas be judged according to the law in existence when the conviction became final."). In contrast, the Fourth Circuit's interpretation of section 2254(d)(1) would require a federal court to give effect to state court interpretations of the Constitution independently determined by the federal court to be erroneous and to have been erroneous at the time that the state court acted.

Furthermore, it is error to equate the denial of relief from an erroneous state court decision with the denial of damages to a plaintiff in a civil rights action under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). *Cf. Green*, 143 F.3d at 875; *Lindh*, 96 F.3d at 873. Only because the Fourth and Seventh Circuits apparently believe that state court judges make no law when they apply rules to facts can they equate denying relief from an erroneous state court decision with denying damages to a citizen unconstitutionally rousted from his home at the end of a police officer's nightstick. Yet a state judge's "wrong" decision makes "law" in a way that a police officer's unconstitutional search can never do. That is why the Supremacy Clause singles out "the Judges in every State," not the constables, as those whose unique law-making function requires that they be "bound" by the "supreme Law of the Land." U.S. Const. art. VI. And that is why the federal courts' essential function of keeping federal law supreme requires them to annul every constitutionally erroneous legal decision of a state court properly before them, but not to remedy every police officer's constitutional tort. *See* Liebman & Ryan, *supra*, p. 879.

An interpretation of section 2254(d)(1) which, like the Fourth Circuit's, requires federal courts to take the unprecedented step of deferring to state court rulings on issues of federal constitutional law, threatens the independence of "the Judicial power" and undermines the very foundation of our constitutional system by fundamentally altering the manner in which federal judges decide constitutional issues. *Amici curiae* therefore respectfully urge this Court to reject the Fourth Circuit's interpretation in favor of one that achieves the goal of respecting state court decisions without encroaching upon the essential constitutional prerogative of the federal courts to say what the law is and to effectuate their conclusions in a manner that preserves the supremacy of national law. Further, because the "contrary to" clause provides a constitutional standard of review, *amici curiae* urge the Court to reject the Fourth Circuit's narrow holding regarding when this standard of review should be applied.

III. THE COURT SHOULD AVOID INTERPRETING THE "CLEARLY ESTABLISHED BY FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT" CLAUSE OF 28 U.S.C. § 2254(d)(1), BECAUSE IT RAISES SERIOUS CONSTITUTIONAL QUESTIONS AND IS NOT SQUARELY PRESENTED BY THIS CASE.

The "clearly established by Federal law, as determined by the Supreme Court" clause of 28 U.S.C. § 2254(d)(1) works a substantial change from previous law by prohibiting federal courts from granting a habeas petition when the state court ruling appealed from conflicts with or is an unreasonable application of circuit

court holdings.[6] *See Sweeney v. Parke*, 113 F.3d 716, 718 (7th Cir. 1997) ("[Circuit courts are] no longer permitted to apply [their] own jurisprudence, but must look exclusively to Supreme Court caselaw."); *Lindh*, 96 F.3d at 869 (holding that section 2254(d)(1) "is a retrenchment from former practice, which allowed the United States courts of appeals to rely on their own jurisprudence in addition to that of the Supreme Court"); *Moore v. Calderon*, 108 F.3d 261, 264 (9th Cir.), *cert. denied*, 521 U.S. 1111 (1997).

This change raises serious separation of powers concerns. In accordance with the Court's long-standing policy of avoiding unnecessary constitutional issues, and because the interpretation of this clause is not here before the Court, *amici curiae* respectfully urge the Court not to interpret this clause in this case.

The "clearly established by Federal law, as determined by the Supreme Court" clause of section 2254(d)(1), like the statute invalidated in *Klein*, prevents

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[6] Several circuits have held that federal courts may consider the opinions of lower federal courts when determining whether a state court interpretation of this Court's precedent was reasonable. *See, e.g., O'Brien*, 145 F.3d at 21, 25; *Matteo*, 171 F.3d at 890; *Mata v. Johnson*, 99 F.3d 1261, 1269 (5th Cir. 1996), *vacated in part on other grounds*, 105 F.3d 209 (5th Cir. 1997). Several circuits have also interpreted this clause as permitting the consideration of "the decisions of inferior federal courts as helpful amplifications of Supreme Court precedent." *Matteo*, 171 F.3d at 890; *Green*, 143 F.3d at 882 (implying that habeas could be granted based upon a lower federal court "opinion which simply makes explicit a proposition of law that was implicit but nonetheless clearly established in previous Supreme Court caselaw"). However, no circuit has yet held that a federal court can grant habeas when the state court ruling was contrary to or an unreasonable application of lower federal court precedent that did more than merely add a gloss to existing Supreme Court precedent.

Article III courts from exercising "[their] own judgment" and instead "prescribe[s] a rule for decision of the cause." It does so in two respects. First, by preventing all Article III courts from turning to the decisions of lower Article III courts in deciding habeas cases, it prevents them from applying the entire body of supreme federal law to cases before them. *See* discussion *supra* part I.D. Federal judges are thus forced, in violation of *Marbury*, to choose between section 2254(d)(1) and their duty to apply the entire Constitution to cases properly before them. For example, even if every circuit court were in agreement that the Constitution as construed by this Court protected a particular right, and even if they had been in agreement regarding this principle for several decades, a federal habeas court could not grant a petition based on that right if this Court had not issued an opinion on point. In fact, even if this Court's precedents indicated that it would create a particular rule when it was confronted with the right set of facts, and even if every circuit to reach the issue had relied upon that rule in anticipation of this Court's decision, a federal habeas court still could not grant a petition based on that rule. "To require the federal judiciary to hold that there is no constitutional violation simply because there is no case of the Supreme Court of the United States directly on point, is to deny it the right to refer to the corpus of jurisprudence to which it turns when it must 'say what the law is.' " *Lindh*, 96 F.3d at 887 (Ripple, J., dissenting) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

Of course, in exercising the judicial power to decide cases before them federal courts must decide only the question presented. For example, under this Court's rule in *Teague*, with limited exceptions habeas courts can grant relief only if the state court failed to follow the law in effect at the time when the petitioner's conviction and

sentence became final – they cannot apply more recent law, even Supreme Court precedent. *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). However, *Teague* is distinguishable from section 2254(d)(1) in two ways. First, as a judge-imposed rule *Teague* affirms, rather than undermines, the separation of powers. *Compare Plaut*, 514 U.S. at 234-35 (noting that Fed. R. Civ. P. 60(b)(5) does not create separation of powers problems because it "does not impose any legislative mandate-to-reopen on the courts, but merely reflects and confirms the courts' own inherent and discretionary power"). Second, *Teague* accords with the purpose of habeas corpus, which is to ensure that state courts follow the supreme federal law in effect at the time of their decision, including circuit court rulings. *See* discussion *supra* at 23-24. Indeed, federal habeas courts applying *Teague* have traditionally examined state court decisions to ensure that they comport with the entire body of federal constitutional law, including decisions of circuit courts. *See, e.g., Gilmore v. Taylor*, 508 U.S. 333 (1983) (considering whether a Seventh Circuit case announced a new rule under *Teague*); *Ciak v. United States*, 59 F.3d 296, 302-03 (2d Cir. 1995) (granting habeas based on circuit precedent). Section 2254(d)(1), in contrast, requires Article III judges to ignore long-standing and widely accepted circuit court precedent, and it permits state court judges to do the same.

The second, and even more troubling, respect in which the "clearly established by Federal law, as determined by the Supreme Court" clause raises serious separation of powers questions is that it requires inferior federal courts to ignore not only the holdings of other circuits but also their own jurisprudence and that of superior courts. Pursuant to this provision, lower Article III courts must refuse to grant a habeas petition when, according to circuit court precedent, state trial courts

committed constitutional error, if this Court has not yet addressed the issue. Thus, district and circuit courts must ignore binding precedents of the courts of appeals in their own circuits, when those precedents have not been clearly established by this Court. Like RFRA, section 2254(d)(1) attempts to remove the *stare decisis* effect from constitutional rulings by Article III courts, in violation of the principles set forth in *Flores*. *See* discussion *supra* part I.D; *see also* Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts – Opposition, Agreement, and Hierarchy*, 86 Geo. L.J. 2445, 2467-70 (1998). It therefore raises serious constitutional questions, which this Court should decline to reach unnecessarily here.

CONCLUSION

The Fourth Circuit's interpretation of the "unreasonable application" clause of 28 U.S.C. § 2254(d)(1) poses difficult and troubling questions concerning whether Congress encroached upon the essential constitutional prerogative of the federal courts to say what the law is and to effectuate their conclusions in a manner that preserves the supremacy of national law. *Amici curiae* respectfully urge the Court to interpret this provision in a manner that permits Article III judges to exercise independent judgment on issues of federal constitutional law and does not impair "the Judicial power." Moreover, because the "contrary to" clause of this provision does not raise separation of powers problems, *amici curiae* respectfully urge the Court to reject the Fourth Circuit's narrow interpretation of when to apply the standard of review set forth in that clause.

The "clearly established by Federal law, as established by the Supreme Court" clause of section 2254(d)(1)

also raises important separation of powers issues. However, the interpretation of that provision is not currently before the Court. *Amici curiae* therefore respectfully request this Court to defer interpretation of that clause until required to do so by a pending case.

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Supreme Court of the United States

TERRY WILLIAMS,

Petitioner,

v.

JOHN TAYLOR, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF VIRGINIA COLLEGE OF CRIMINAL DEFENSE ATTORNEYS AND VIRGINIA TRIAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The Virginia College of Criminal Defense Attorneys (VCCDA), and the Virginia Trial Lawyers Association (VTLA) file this joint brief in support of the Petitioner. *See*, Rule 37.3(a). Counsel for Petitioner and Respondent have consented to the filing of this Brief.[1]

VCCDA is recognized by the National Association of Criminal Defense Lawyers as its Virginia state affiliate. VCCDA is a statewide, non-profit organization of approximately 470 criminal defense practitioners. Its purpose is to enhance the quality of criminal justice in the Commonwealth of Virginia and to defend individual liberties guaranteed by the Bill of Rights. It has a keen interest in ensuring that criminal and post-conviction proceedings in the Commonwealth are handled in a proper and fair manner. To that end, it conducts continuing legal education seminars for criminal defense practitioners to improve the quality of their representation. In addition, it provides direct services to its members when they face important issues implicating the fundamental fairness of the criminal justice system, including litigation advice and support, research and the filing of amicus briefs.

VTLA is a non-profit professional organization of approximately 2,800 trial lawyers throughout the Commonwealth of Virginia. Founded in 1960, VTLA works to

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity other than VCCDA or VTLA and their members, made any monetary contributions to its preparation or submission. *See* Rule 37.6.

enhance the professionalism and skills of trial lawyers and to promote the fair and effective administration of justice. VTLA includes among its interest sections a Criminal Law Section. Its members regularly participate in trials in state and federal courts. As an association of trial lawyers dedicated to preserving the rights of individual litigants in civil and criminal trials, VTLA believes it is well situated to recognize issues of importance to trial lawyers and their clients and to assist the Court.

Members of VCCDA and VTLA are regularly retained and appointed by the courts of the Commonwealth and the United States to represent capital and other defendants, and to represent inmates in habeas corpus proceedings.

The decisions of the Virginia Supreme Court and the Fourth Circuit, reversing, respectively, the decisions of the state circuit court and the United States District Court as to the standards applicable to ineffective assistance of counsel claims eviscerate the Sixth Amendment right to counsel in the Commonwealth. Being committed to the constitutional rights of all criminal defendants and to the need for defendants to be able to vindicate those rights in both the courts of the Commonwealth and the United States, *Amici* believe that the decision in this case must be overturned.

The brief of *Amici* attempts to demonstrate four points as to the enforcement of the constitutional guarantee of the effective assistance of counsel in Virginia: (1) relief is not available through post-conviction proceedings in capital cases; (2) relief based upon claims of

ineffective assistance of counsel specifically is not available in capital cases; (3) these circumstances are not the result of a system that assures quality representation in capital cases; and (4) no instances of egregiously deficient representation will be remedied if the standard of *Lockhart v. Fretwell*, 506 U.S. 364 (1993) is grafted onto that of *Strickland v. Washington*, 466 U.S. 668 (1984).

SUMMARY OF ARGUMENT

There is no meaningful opportunity for post-conviction relief in Virginia, at least in capital cases. With the single exception of one case in which the Commonwealth conceded prosecutorial misconduct, relief has been denied in every capital habeas corpus case. Both times a trial judge has granted post-conviction relief, the Virginia Supreme Court has reversed that decision. Since it has obtained sole, original jurisdiction over such cases, the Court has not even granted an evidentiary hearing, much less relief.

The fact that relief was recommended in the instant case is particularly significant given the record of the presiding judge. However calculated, that judge has sentenced more defendants to death than any other Virginia judge. He has also denied relief in each of the other capital post-conviction cases over which he has presided.

Nothing in the Virginia system accounts for the conspicuously unique record of the Virginia judiciary in general, and the Virginia Supreme Court in particular, in rejecting all claims for post-conviction relief, other than an apparent commitment to reject any attempt to upset a

death sentence. Only voluntary standards for capital counsel exist and those establish only weak qualifications. Moreover, counsel are not provided the resources necessary to adequately defend capital cases. Finally, the absence of post-conviction relief cannot be explained by the Court's commitment to correcting errors on direct appeal; the Court's rate of granting relief there is nearly as low as it is in post-conviction.

The last thing the Sixth Amendment needs in Virginia is the creation of an even higher standard than that which was established in *Strickland v. Washington*, 466 U.S. 668 (1984). Yet that is what the Virginia Supreme Court and the Fourth Circuit have done in this case. The additional hurdle found by those Courts in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), and invoked to thwart the judgment of the trial judge in the Petitioner's case, will truly be the death knell for ineffective assistance of counsel claims in the Commonwealth, assuming the Sixth Amendment is not already beyond resuscitation.

ARGUMENT

I. POST-CONVICTION RELIEF IS NOT AVAILABLE IN THE COURTS OF VIRGINIA IN DEATH PENALTY CASES, INCLUDING AS TO CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The recommendation of the circuit court judge in this case to grant the Petitioner relief as to his death sentence is virtually unique in modern Virginia capital punishment jurisprudence. With but one exception, not since 1983 had

a Virginia circuit court judge, or the justices of the Virginia Supreme Court, granted post-conviction relief in a capital case.[2]

See, Clark v. Virginia Dep't of Corrections, 318 S.E.2d 399 (Va. 1984). Moreover, no Virginia court has granted such relief since the decision in Petitioner's case, nor had any done so in the capital habeas cases which preceded the Supreme Court's decision in *Clark*. Relief has thus been denied in all 100 Virginia death penalty habeas corpus cases under the modern statute where the Commonwealth has not confessed error, including the two cases in which relief was granted by the trial judge, those of Clark and Williams.[3]

The vast majority of these petitions contained Sixth Amendment claims of ineffective assistance of counsel. Indeed, only nine of those 100 petitions did not, or were filed untimely and, therefore, not addressed on the merits.[4] Thus, relief on ineffective assistance of counsel

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[2] That exception was the case of Wilbert Evans, in which the Commonwealth confessed error. The prosecutor had used criminal convictions against Evans which actually did not exist. The case involved a claim of prosecutorial misconduct, not ineffective assistance of counsel. *See, Evans v. Commonwealth*, 323 S.E.2d 114 (Va. 1984).

[3] *Amici* do not include here any successor petitions. Every such petition has been denied.

[4] Those capital cases in which the petitioners did not raise ineffective assistance claims in their initial state petitions are *Coppola v. Warden*, 282 S.E.2d 10 (Va. 1981); *Waye v. Townley*, 871 F.2d 18 (4th Cir. 1989); *Justus v. Murray*, 897 F.2d 709 (4th Cir. 1990); *Stamper v. Baskerville*, 531 F. Supp. 1122 (E.D. Va. 1982); *Townes v. Angelone*, C.A. No. 2:96CV42, 1996 WL 71809 (E.D. Va.

grounds has ultimately been denied by the Virginia courts in each of the ninety-one capital cases in which it has been timely raised.[5]

The significance of the circuit court's decision in Petitioner's case is all the more dramatic given the record of that particular court – and the presiding judge – in death penalty cases. More defendants have been sentenced to death in the Circuit Court of the City of Danville than in any other jurisdiction in Virginia.[6] Judge Ingram, who granted Petitioner relief in his post-conviction case, presided over each of those cases, five times

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Jan. 17, 1996); *Mu'Min v. Thompson*, No. 93-6499, 1993 WL 307128 (4th Cir. Aug. 5, 1993); *Satcher v. Netherland*, 944 F. Supp. 1222 (E.D. Va. 1996); and *Mackall v. Angelone*, 131 F.3d 442 (4th Cir. 1997).

In *Weeks v. Angelone*, 4 F. Supp. 2d 497 (E.D. Va. 1998), *aff'd*, No. 98-21, 1999 WL 288504 (4th Cir. May 10, 1999), Petitioner's counsel filed the petition in the circuit court, instead of in the Virginia Supreme Court. *See*, Va. Code Ann. § 8.01-654 (Michie 1992). As a result, his Sixth Amendment claims were held to be defaulted. *See, Weeks*, 4 F. Supp. 2d at 511.

[5] In two cases, the petition filed in the circuit court raised such a claim and relief was denied, but the appeal to the Virginia Supreme Court was untimely. *See, Coleman v. Thompson*, 501 U.S. 722 (1991); *Wise v. Williams*, 982 F.2d 142 (4th Cir. 1992).

[6] The defendants sentenced to death in Danville are Johnny Watkins, who was sentenced to death in two separate trials, *see, Watkins v. Commonwealth*, 331 S.E.2d 422 (Va. 1995); Dana Ray Edmonds, *see, Edmonds v. Commonwealth*, 329 S.E.2d 807 (Va. 1985); Ronald Watkins, *see, Watkins (Ronald) v. Commonwealth*, 385 S.E.2d 50 (Va. 1989); Calvin Swann, *see, Swann v. Commonwealth*, 441 S.E.2d 195 (Va. 1994); *see*, William Saunders, *Saunders v. Commonwealth*, 406 S.E.2d 39 (Va. 1991); and Percy Walton, *see, Walton v. Commonwealth*, 501 S.E.2d 134 (Va. 1998).

imposing the jury's recommended sentence of death and concluding that death was the appropriate punishment himself in the three cases tried without a jury. Moreover, Judge Ingram dismissed each of the other six capital habeas corpus petitions that were filed for the capital defendants he had sentenced to death,[7] as well as one petition filed by a capital defendant in a neighboring jurisdiction.[8]

The record of Judge Ingram and the Danville Circuit Court is all the more impressive when it is compared to the rest of the Commonwealth. While Judge Ingram has imposed death sentences in eight different cases, the remainder of the Virginia judiciary has imposed death sentences in only 123 cases.[9] Thus, Judge Ingram is

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[7] Judge Ingram did not consider the petition of Percy Walton, whose habeas corpus petition was filed directly in the Virginia Supreme Court, pursuant to the 1995 amendments to § 8.01-654 of the Virginia Code.

[8] That petitioner was Walter Correll, who was sentenced to death in Franklin County. *See, Correll v. Thompson*, 63 F.3d 1279 (4th Cir. 1995).

[9] Judge Wilkinson of the Circuit Court of the City of Richmond is the only other judge in the Commonwealth to have imposed death sentences in as many as five cases. *See, Walker v. Commonwealth*, No. 990096, 1999 WL 381557 (Va. Jun. 11, 1999); *Graham v. Commonwealth*, 459 S.E.2d 97 (Va. 1995); *Spencer v. Commonwealth*, 384 S.E.2d 785 (Va. 1989); *Spencer v. Commonwealth*, 385 S.E.2d 850 (Va. 1989); *Briley (James) v. Commonwealth*, 273 S.E.2d 57 (Va. 1980). In fact, only eleven death sentences have been handed down in the City of Richmond, even though Richmond has almost *four times* the population of Danville and more murders in one year than Danville has had since 1970. *See,* Government Information Sharing Project, *General Profile for Richmond City, Virginia*

responsible for imposing death sentences in 6.5% of the Virginia cases resulting in a capital sentence, even though his jurisdiction accounts for only 0.8% of the population of Virginia.[10] In other words, Virginians are *eight times* more likely to be sentenced to death in Danville – and by Judge Ingram – than in the rest of the Commonwealth.

When all is said and done, Judge Ingram has sentenced to death more defendants than any other judge in the state which has executed more defendants than any other state but one, and which has granted less capital post-conviction relief – i.e., none – than any other state in the country with a significant death row population.[11]

(visited Jun. 23, 1999) <http://govinfo.library.orst.edu/cgi-bin/state2?va> (reporting the population of Richmond to be 203,506 according to the 1990 census); *General Profile for Danville City, Virginia, id.* (reporting the population of Danville to be 53,056 according to the 1990 census).

[10] The population of the Commonwealth is 6,187,358 and of the City of Danville is 53,056, according to the 1990 census. *See, General Profile for Virginia* and *General Profile for Danville City, Virginia, supra* note 9.

[11] Notably, other states, including some which have not been shy about executions, have found cases worthy of relief on ineffective assistance of counsel grounds, even in relation to the investigation and presentation of mitigation, as in the Petitioner's case. *See, e.g., State v. Brooks*, 661 So.2d 1333 (La. 1995); *Torres-Arboleda v. Dugger*, 636 So.2d 1321 (Fla. 1994); *State v. Tokman*, 564 So.2d 1339 (Miss. 1990); *Wilson v. State*, 787 P.2d 401 (Nev. 1988); *State v. Twenter*, 818 S.W.2d 628 (Mo. 1991); *People v. Ruiz*, 686 N.E.2d 574 (Ill. 1997); *Burris v. State*, 558 N.E.2d 1067 (Ind. 1990); *Ross v. Kemp*, 393 S.E.2d 244 (Ga. 1990); *Ex Parte Womack*, 541 So.2d 47 (Ala. 1988); *In re Neely*, 864 P.2d 474 (Cal. 1993); *State v. Fisher*, 730 P.2d 825 (Ariz. 1986).

II. THIS EXTRAORDINARY RECORD OF VIRGINIA'S COURTS IS NOT ATTRIBUTABLE TO ANY SYSTEM THAT ASSURES THE APPOINTMENT OF COMPETENT COUNSEL OR THE PROVISION OF ADEQUATE RESOURCES TO THE DEFENSE.

The complete absence of findings of Sixth Amendment violations by Virginia's courts is surely not attributable to some uniform excellence in capital representation in Virginia. Until 1992, Virginia had no qualification standards for counsel appointed to represent capital defendants. *See*, Va. Code Ann. §§ 19.2-163.7, 19.2-163.8 (Michie 1995). Virginia then committed to the State Bar and Public Defender Commission the responsibility to adopt standards for the appointment of counsel in such cases and to maintain lists of attorneys qualified under those standards.[12] *See*, § 19.2-163.8.

The *de minimus* standards established pursuant to this section, however, are plainly inadequate to assure that only counsel capable of providing quality representation to capital defendants are appointed. They require only experience as lead counsel in five felony trials involving crimes of violence punishable by at least *five years* imprisonment. Perhaps most significantly, the Public Defender Commission has never established any mechanism for evaluating or enforcing the statutory

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[12] While § 19.2-163.7 appears to require the appointment of counsel from the lists maintained by the Public Defender Commission, § 19.2-163.8C specifically states that, notwithstanding that section, the court may appoint counsel who is not on the lists.

requirement that counsel exhibit a "demonstrated proficiency and commitment to quality representation." *See*, § 19.2-163.8. Finally, noncompliance with the provisions of these sections is explicitly eliminated as "a basis for a claim of error at trial. . . . " § 19.2-163.8D. Thus, use of the standards, as inadequate as they are, and the lists of "qualified" attorneys, is ultimately voluntary.

Not only do these minimum, non-mandatory qualifications for capital trial counsel do little to assure the appointment of competent counsel, Virginia law does nothing to provide counsel with the resources necessary to provide adequate representation. Virginia law does not require the provision of – and trial courts rarely do provide – investigative sources. *See, e.g., Pope v. Commonwealth*, 360 S.E.2d 352, 356 (Va. 1987) (and cases cited therein). Thus, in Petitioner's own case, the request for an investigator was denied.[13]

Whether or not for these reasons, the record of capital cases demonstrates that the failure of the Virginia courts to grant relief on Sixth Amendment claims cannot be attributed to the quality of representation.[14] Indeed,

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[13] The problem with obtaining resources is so acute in Virginia that, despite the obvious need for it in this case, counsel did not even realize that a pathologist could be appointed. *Williams v. Pruett*, C.A. No.97-1627-A (E.D. Va. April 7, 1998), *Slip op.* at 18-19, *rev'd, sub nom, Williams v. Taylor*, 163 F.3d 860 (1998), *cert. granted*, 119 S.Ct. 1355 (1999).

[14] Likewise, it cannot be attributed to the generosity of the Virginia Supreme Court on direct appeal. The Court has reversed only eight of 121 capital trials, as to either guilt or punishment. Three of those cases were among the first ten reviewed under the modern statute. *See, Johnson v.*

Virginia death cases are replete with appalling omissions by counsel. Larry Stout's counsel, for example, performed only a "minimal" investigation and presentation of mitigating evidence. *Stout v. Thompson*, C.A. No. 91-0719-R, *Slip op.* at 17 (W.D. Va. July 31, 1995), *rev'd sub nom, Stout v. Netherland*, Nos. 95-4008, 95-4007, 1996 WL 496601 (4th Cir. Sept. 3, 1996), *cert. denied*, 519 U.S. 1036 (1996). Stout's background included "[m]ost forms of abuse that can possibly be perpetrated on a single human being:" stigmatization, even within his own family, due to his mixed race parentage, extreme parental alcoholism, a father who forced him to work in migrant labor camps, horrifying physical and sexual abuse by his father, drug problems, a family lifestyle which precluded his receiving an education and mental deficiencies. It was described by two mental health experts as "one of the worst [personal histories] they had seen." *Slip op.* at 15-16. According to the District Court in Stout's case, this information was readily available to trial counsel. *Id.* at 15. Nevertheless, the Virginia circuit court and Supreme Court rejected

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Commonwealth, 255 S.E.2d 525 (Va. 1979); *Martin v. Commonwealth*, 271 S.E.2d 123 (Va. 1980); *Patterson v. Commonwealth*, 283 S.E.2d 212 (Va. 1981). Until the recent reversal of a death sentence in *Atkins v. Commonwealth*, 510 S.E.2d 445 (Va. 1999), the Court had affirmed every capital case during the previous eight years, *see, Rogers v. Commonwealth*, 410 S.E.2d 621 (Va.1991), although it did remand one case for resentencing after this Court's vacation of its judgment. *See, Mickens v. Commonwealth*, 457 S.E.2d 9 (Va. 1995). Of course, among the Court's most recent affirmances in a capital case was its unanimous decision in *Lilly v. Commonwealth*, 499 S.E.2d 522 (Va. 1998), which this Court reversed, also unanimously. 1999 WL 373136 (U.S. Va. June 10, 1999).

Stout's Sixth Amendment claim for no stated reasons, without even the benefit of an evidentiary hearing.

One of the most remarkable examples of the Virginia Supreme Court's disdain for claims of ineffective assistance of counsel is to be found in the case of Kevin Cardwell. Following the appointment of a mental health expert to assist the defense, counsel failed to arrange for a timely evaluation. After the jury fixed their client's sentence at death, counsel still failed to have the evaluation completed prior to his actual sentencing, either for presentation to the judge in connection with the actual sentencing,[15] or for a proffer to demonstrate the prejudice flowing from the court's denial of their earlier motion for a continuance. *See, Cardwell v. Netherland*, 971 F. Supp. 997, 1005 (E.D. Va. 1997), *aff'd sub nom, Cardwell v. Greene*, 152 F.3d 331 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 587 (1998).

On appeal, the Virginia Supreme Court, in rejecting Cardwell's challenge to the trial court's denial of a continuance, noted that, while one prior continuance had been granted, and the trial court had promptly appointed the defense expert, counsel had failed to determine if the expert was available until after that appointment was made. *Cardwell v. Commonwealth*, 450 S.E.2d 146, 150-52 (Va. 1995), *cert. denied*, 115 S.Ct. 1826 (1995). Even then, counsel waited three weeks, until the commencement of

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[15] Although the jury "fixes" the sentence, the judge may decline to impose the death penalty for good cause shown. Va. Code § 19.2-264.5; *Stockton v. Commonwealth*, 314 S.E.2d 371, 386 (Va. 1984), *cert. denied*, 469 U.S. 873 (1984).

the penalty phase of the trial, before seeking another continuance. *Id.* at 151-52. Moreover,

> counsel never followed through regarding Cardwell's examination by Dr. Thomas, although the trial court did not sentence Cardwell [for two months]. *Had the examination been performed, we might be in a position to say whether Cardwell's rights were prejudiced.* As the record stands, however, we are left to mere speculation. Under the circumstances, therefore, we cannot say that the trial court abused its discretion in denying the second continuance.

Id. at 152 (emphasis added).

Despite this recognition of counsel's negligence in regard to obtaining a mental health evaluation, seeking a continuance, and making the requisite proffer for appeal, the Virginia Supreme Court denied Cardwell's motion for the appointment of a mental health expert, during his habeas corpus proceeding. *See, Cardwell v. Netherland*, 971 F. Supp. at 1006-7. Consequently, Cardwell was left without the tools necessary to prove, during his state habeas corpus proceeding, the prejudice flowing from the deficient performance which the Virginia Supreme Court itself had recognized on direct appeal.[16]

The failure of the Virginia courts to grant post-conviction relief is plainly not attributable to procedural

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[16] Ultimately, the District Court, after authorizing the services of a mental health expert, determined that Cardwell did not suffer prejudice at his trial. *Cardwell v. Netherland*, 971 F. Supp. at 1017-19. Of course, the Virginia Supreme Court did not know that when it threw up its roadblock to Cardwell proving his Sixth Amendment claim.

safeguards adopted for habeas corpus cases, any more than it is attributable to the existence of safeguards at trial. There is no entitlement to an evidentiary hearing or discovery in Virginia, regardless of the allegations in the petition. Unlike in federal court, the availability of such hearings is simply committed to the discretion of the presiding judge. *Compare, Yeatts v. Murray*, 455 S.E.2d 18, 21 (Va. 1995) *with Blackledge v. Allison*, 431 U.S. 63, 80-83 (1977) (petitioner is entitled to evidentiary hearing if he alleges facts which, if proven, would be sufficient to demonstrate entitlement to relief and which, "when viewed against the [state court] record," are not "so 'patently false or frivolous' as to warrant summary dismissal") (*quoting Herman v. Claudy*, 350 U.S. 116, 119 (1956)). Moreover, discovery is even more rare than evidentiary hearings.[17]

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[17] For example, the Virginia Supreme Court has not granted a discovery motion in a single capital post-conviction case since it assumed jurisdiction. Contrary to the federal rule, discovery is left to the discretion of the presiding judge or justices and, as with evidentiary hearings, no standards for the exercise of that discretion are established. *Compare Yeatts*, 455 S.E.2d at 21 *with Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (discretion is abused if discovery is denied where "specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief. . . . " (*quoting Harris v. Nelson*, 394 U.S. 286, 299 (1969)).

III. ENFORCEMENT OF THE SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL CANNOT TOLERATE A HIGHER STANDARD THAN THAT WHICH EXISTED PRIOR TO THE DECISIONS OF THE VIRGINIA SUPREME COURT AND THE FOURTH CIRCUIT IN THIS CASE.

It is against this backdrop that the history of Petitioner's own case must be assessed. But for the trial judges in the cases of Clark and Petitioner, no Virginia court has found a single attorney in a capital case to have been constitutionally ineffective, or, if ineffective, to have prejudiced his client by his deficient performance. Not only has the Virginia Supreme Court reversed both grants of relief in capital habeas cases, and affirmed every denial of relief by a circuit court judge, it has, since it assumed sole original jurisdiction in such cases in 1995,[18] rejected all fifteen capital habeas petitions filed with it *without granting a single evidentiary hearing*. Thus, in Virginia, after fifteen years of litigation under the formula of *Strickland v. Washington*, 466 U.S. 668 (1984), it *cannot* fairly be said, in capital cases, at least, that *Strickland*'s standard, although "highly demanding," is "by no means insurmountable." *See, Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986); *Williams v. Warden*, 487 S.E.2d 194, 198 (Va. 1997) (*citing, Kimmelman*, 477 U.S. at 382).

Moreover, the determination that was rejected by the Supreme Court in this case was made by the very judge whom Virginia law recognizes as the best situated to assess the merits of a habeas corpus petition – the trial

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[18] *See*, Va. Code Ann. § 8.01-654 (Michie 1992).

judge. As the Virginia Supreme Court stated in *Titcomb v. Wyant*:

> We believe that in most cases where the petitioner raises a claim of ineffective counsel it is logical and appropriate for the trial judge to hear the petition for the writ. The trial judge will have the advantage of having seen trial counsel's performance, which may be skillful or deficient, in the context of an adversary proceeding. *See, United States v. Blue Thunder*, 604 F.2d 550 (8th Cir. 1979), *cert. denied*, 444 U.S. 902 (1979). The trial judge also will have heard the evidence and gauged the credibility of witnesses. . . .

333 S.E.2d 82, 87 (Va. 1985). That, of course, is no less true in relation to the assessment of the prejudice flowing from counsel's deficient performance, just as, in the view of the District Court, it was true as to the trial judge's "unique position of being able to judge [defense counsel's] performance during trial." *Williams v. Pruett, Slip. op.* at 18. Nevertheless, just as it did in the case of James T. Clark, Jr., the Virginia Supreme Court rejected the conclusions of the trial judge – a judge with no reluctance to impose capital punishment or to protect such sentences once he imposes them – to maintain its perfect record of rejecting such claims and, indeed, post-conviction relief of any kind in capital cases.

Implicit in the Virginia Supreme Court's conclusion that Petitioner had not met the standard set forth in *Lockhart v. Fretwell*, 506 U.S. 364 (1993) is that the judgment in his favor constituted a "windfall." *See, id.* at 369-70. Indeed, the Court quoted the "windfall" language from *Fretwell*. *See, Williams v. Warden*, 487 S.E.2d at 198.

The notion, however, that the trial/habeas judge in this case would have bestowed a "windfall" on a capital petitioner, such as Williams, is beyond serious consideration.

It simply cannot be the case that the law actually demands a standard more onerous than that which has enabled the Virginia judiciary to ultimately reject every claim of ineffective assistance of counsel in a capital case, including the Virginia Supreme Court's dismissal, without even the benefit of an evidentiary hearing, all twenty-five capital habeas cases which have been filed with it since it assumed original jurisdiction over such cases.[19] A showing of a "reasonable probability" – i.e., a "probability sufficient to undermine confidence in the result" – that a capital defendant would not have been sentenced to death, as is required under *Strickland*, 466 U.S. at 694, surely satisfies the state's concern for making the trial "the main event," *see, e.g., Wainwright v. Sykes*, 433 U.S. 72, 90 (1977), without adding a new requirement that the petitioner demonstrate that his trial was "fundamentally unfair[ ]," *see, Williams v. Warden*, 487 S.E.2d at 198 (*quoting, Fretwell*, 506 U.S. at 369). It is unfair enough that the defendant was sentenced to death due to his lawyer's deficient performance in a proceeding sufficiently unreliable that the court lacks confidence in the outcome. The addition of this further burden will surely prove fatal to

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[19] Although the Supreme Court exercised its original jurisdiction over Petitioner's case once the new statute was passed, an evidentiary hearing had already been ordered by the circuit court.

the already terribly wounded Sixth Amendment right to the *effective* assistance of counsel.

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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APPENDIX

CODE OF VIRGINIA ANNOTATED

§ 8.01-654. When and by whom writ granted; what petition to contain. – A. 1. The writ of habeas corpus ad subjiciendum shall be granted forthwith by the Supreme Court or any circuit court, to any person who shall cause to believe that he is detained without lawful authority.

* * *

C. 1. With respect to any such petition filed by a petitioner held under the sentence of death, and subject to the provisions of this subsection, the Supreme Court shall have exclusive jurisdiction to consider and award writs of habeas corpus. The circuit court which entered the judgment order setting the sentence of death shall have authority to conduct an evidentiary hearing on such a petition only if directed to do so by order of the Supreme Court.

* * *

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§ 19.2-163.7. Counsel in capital cases. – In any case in which an indigent defendant is charged with a capital offense, the judge of the circuit court, upon request for the appointment of counsel, shall appoint one or more attorneys from the list or lists established by the Public Defender Commission pursuant to § 19.2-163.8 to represent the defendant at trial and, if the defendant is sentenced to death, on appeal. If the sentence of death is affirmed on appeal, the court shall, within thirty days after the decision of the Supreme Court of Virginia,

appoint counsel from the same list, or such other list as the Commission may establish, to represent an indigent prisoner under sentence of death in a state habeas corpus proceeding. The Attorney General shall have no standing to object to the appointment of counsel for the petitioner.

---

§ 19.2-163.8. List of qualified attorneys. – A. The Public Defender Commission, in conjunction with the Virginia State Bar, shall adopt standards for the appointment of counsel in capital cases, which take into consideration, to the extent practicable, the following criteria: (i) license or permission to practice law in Virginia; (ii) general background in criminal litigation; (iii) demonstrated experience in felony practice at trial and appeal; (iv) experience in death penalty litigation; (v) familiarity with the requisite court system; (vi) current training in death penalty litigation; and (vii) demonstrated proficiency and commitment to quality representation.

B. The Public Defender Commission shall maintain a list or lists of attorneys admitted to practice law in Virginia who are qualified to represent indigent defendants charged with capital murder or sentenced to death. In establishing such a list or lists, the Commission shall consider all relevant factors, including but not limited to, the attorney's background, experience, and training and the Commission's assessment of whether the attorney is competent to provide quality legal representation.

C. Notwithstanding the requirements of § 19.2-163.7, the judge of the circuit court may appoint counsel who is not included on the lists (sic) or lists, but who otherwise qualifies under the standards established and maintained by the Commission.

D. Noncompliance with the requirements of this article shall not form the basis for a claim or error at trial, on appeal, or in any habeas corpus proceeding. The performance of habeas corpus counsel appointed pursuant to this article shall not form a basis for relief in any subsequent habeas corpus proceeding.

E. By July 1, 1992, the Public Defender Commission shall, in conjunction with the Virginia State Bar, promulgate and thereafter maintain standards for the qualifications of counsel who shall be considered eligible to be placed on a list for appointment.

F. The provisions of this article, with the exception of subsection E, shall not become effective until July 1, 1992.

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§ 19.2-264.5. Post-sentence reports. – When the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just.

FEBRUARY 22, 1992

STANDARDS FOR THE QUALIFICATION OF APPOINTED COUNSEL IN CAPITAL CASES

Pursuant to Section 19.2-163.8(E) of the **Code of Virginia** of 1950, as amended, the Public Defender Commission, in conjunction with the Virginia State Bar, hereby sets forth the following standards for appointed counsel determined to be qualified and possessing proficiency and commitment to quality representation in capital cases.

* * *

A. TRIAL COUNSEL:

1. Court-appointed "lead counsel" must:

   a. Be an active member in good standing of the Virginia State Bar or admitted to practice *pro hac vice*.

   b. Have at least five years of criminal litigation practice with demonstrated competence.

   c. Have had, within the past two years, some specialized training in capital litigation.

   d. Have at least *one* of the following qualifications:

      i. Experience as "lead counsel" in the defense of at least one capital case;

      ii. Experience as "co-counsel" in the defense of at least two capital cases;

iii. Experience as "lead counsel" (or as lead prosecutor) in at least five felony jury trials in Virginia courts involving crimes of violence which carry, upon conviction, a minimum sentence of at least five years imprisonment.

e. Be familiar with the requisite court system, including specifically the procedural rules regarding timeliness of filings and procedural default.

f. Have demonstrated proficiency and commitment to quality representation.

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No. 98-8384

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v.

JOHN TAYLOR, Warden,
Sussex 1 State Prison,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF PROFESSORS LANCE G. BANNING, JACK N. RAKOVE, WILLIAM W. VAN ALSTYNE, AND GORDON G. YOUNG IN SUPPORT OF PETITIONER

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Buckley v. Valeo, 424 U.S. 1 (1976) 8

Clinton v. Jones, 520 U.S. 681 (1997) 26

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Crowell v. Benson, 285 U.S. 22 (1932) 6, 19, 27

Felker v. Turpin, 518 U.S. 651 (1996) 13

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INS v. Chadha, 462 U.S. 919 (1983) 7, 8

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Michaelson v. United States, 266 U.S. 42 (1924) 19

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New York v. United States, 505 U.S. 144 (1992) 8, 10

Norris v. Alabama, 294 U.S. 587 (1935) 28, 29

Pacemaker Diagnostic Clinic of America, Inc. v. Instro-Medix, 725 F.2d 537 (9th Cir.), *cert. denied*, 496 U.S. 826 (1984) 21

Pierre v. Louisiana, 306 U.S. 354 (1939) 28

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) 26

Powell v. McCormack, 395 U.S. 486 (1969) 8

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Thompson v. Keohane, 516 U.S. 99 (1995) 28

United Gas Public Service Co. v. Texas, 303 U.S. 123 (1938) 28

United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) ... 19, 21, 22, 24, 26

United States v. Padelford, 76 U.S. (9 Wall.) 531 (1870) 21

United States v. Sioux Nation, 448 U.S. 371 (1980) 26

West Lynn Creamery v. Healy, 512 U.S. 186 (1994) 10

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Wright v. West, 505 U.S. 277 (1992) 28, 29

Yakus v. United States, 321 U.S. 414 (1943) 24

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. III ..... *passim*

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 1996 U.S.C.C.A.N. (110 Stat.) 1214 ..... *passim*

28 U.S.C. § 1738 24

28 U.S.C. § 2241(c)(3) 29

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28 U.S.C.A. § 2254(d)(1) 6, 29

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MISCELLANEOUS

Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (1995) 9

Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 Vill. L. Rev. 1030 (1982) 12, 13

Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 Wis. L. Rev. 39 13

The Complete Anti-Federalist (Herbert J. Storing ed., 1981) 14

3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1866) 12

David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 B.Y.U.L. Rev. 75 19

The Federalist No. 39 (James Madison) (Isaac Kramnick ed., 1987) 16

The Federalist No. 47 (James Madison) (Isaac Kramnick ed., 1987) 14

The Federalist No. 80 (Alexander Hamilton) (Isaac Kramnick ed., 1987) 18

The Federalist No. 81 (Isaac Kramnick ed., 1987) 18

1 Julius Goebel, Jr., *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* (1971) 13

Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953) 24

James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696 (1998) 10, 12

Henry Paul Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1 (1983) 20

Henry Paul Monaghan, *We the Peoples, Original Understanding, and Constitutional Amendment*, 96 Colum. L. Rev. 121 (1996) 7

9 *The Papers of James Madison 9 Apr. 1786-24 May 1787* (Robert A. Rutland et al. eds., 1975) 10

10 *The Papers of James Madison 27 May 1787-3 Mar. 1788* (Robert A. Rutland et al. eds., 1977) 13

Jack N. Rakove, *James Madison and the Creation Break of the American Republic* (1990) 10

Jack N. Rakove, *Original Meanings* (1996) 7, 8, 11

Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 Stan. L. Rev. 1031 (1997) 11, 14

The Records of the Federal Convention of 1787 (Max Farrand ed., 1911) ..... *passim*

Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17 (1981) 11, 19, 22

William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 Duke L.J. 291 (1996) 20

Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 Cath. U. L. Rev. 671 (1997) 18

Herbert Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001 (1965) 14

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MOTION OF PROFESSORS LANCE G. BANNING, JACK N. RAKOVE, WILLIAM W. VAN ALSTYNE, AND GORDON G. YOUNG FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER

The individuals listed above hereby move, pursuant to Rule 37.2, for leave to file the attached brief amici curiae in support of petitioner. The consent of petitioner has been obtained and filed with this Court. Respondent has refused to consent to the filing of this brief.

The above-named individuals are law and history professors who have taught and written about the important constitutional issues presented in this case, and who have a strong interest in the proper resolution of those issues by this Court. The attached brief sets forth the above-named individuals' scholarly perspective on these issues and is intended to assist this Court in construing an Act

of Congress in a way that avoids the need for inquiry into the constitutionality of that Act.

For the foregoing reasons, the above-named individuals respectfully request leave to file the attached brief amici curiae in support of petitioner.

Respectfully submitted,

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Dated: June 28, 1999

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INTEREST OF AMICI CURIAE

The amici named below are law and history professors who have taught and written about the important constitutional issues presented, directly and indirectly, in this case. This brief sets forth their considered view from a scholarly perspective on those issues, and is intended to serve as an aid to this Court in the correct construction of an Act of Congress, thus avoiding the need for an unnecessary inquiry into the constitutionality of that Act. Amici join in this brief solely on their own behalf and not as representatives of their universities:

Lance G. Banning, Professor of History, University of Kentucky

Jack N. Rakove, Professor of History, Stanford University

William W. Van Alstyne, William and Thomas Perkins Professor of Law, Duke University School of Law

Gordon G. Young, Professor of Law, University of Maryland School of Law .[1]

SUMMARY OF ARGUMENT

The Fourth Circuit below held that Congress's enactment of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 1996 U.S.C.C.A.N. (110 Stat.) 1214 ("AEDPA"), obliges Article III courts to defer to state court rulings on matters "arising under," and dispositive of the meaning of, federal constitutional and statutory law. According to the Fourth Circuit, state court rulings on matters of federal law will control even if the federal court finds them to be erroneous. The federal court is not independently free to adopt or enforce its own understanding of the meaning of federal constitutional and statutory law. Instead, the Article III court must leave in force and effect state decisional law -- even that which the Article III court considers to be in conflict with federal law -- unless the error is so egregious that no reasonable jurist could have made it.

Amici believe that this Court should reject this interpretation of AEDPA -- and thus avoid having to address the constitutionality of AEDPA itself -- because it stands the Framers' fundamental constitutional design on its head. In making provisions for the federal judiciary, the Framers contemplated that Article III judges would be vested with the "judicial Power of the United States," and

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[1] Pursuant to Rule 37.6, none of the parties authored this brief in whole or in part and no one other than amici or their counsel contributed money or services to the preparation or submission of this brief.

that this "judicial Power" "shall extend to" all cases "arising under" federal constitutional and statutory law. Through the exercise of the "judicial Power," the Framers intended that the federal judiciary, including this Court and the "inferior" courts, serve an important role in cases within their jurisdiction by independently reviewing state decisional law. Rather than permitting an Article III court to defer to a state court's ruling on matters of federal constitutional and statutory law, the Framers insisted that the federal judiciary guarantee that state decisional and other law conform to the "supreme Law of the Land."

This Court also has recognized, as early as *Marbury v. Madison*, that once Congress has "ordain[ed] and establish[ed]" an Article III court, Congress cannot limit or direct that court's exercise of the "judicial Power of the United States." *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-76, 177-80 (1803). Contrary to the decision of the Fourth Circuit, this Court has established that the exercise of the "judicial Power" necessarily includes the power independently to rule on the "whole" legal case, base that review on the "supreme Law of the Land," and grant relief sufficient to effectuate the federal court's view of federal law and to maintain the federal law's supremacy over conflicting state law.

ARGUMENT

I. THE FRAMERS DID NOT INTEND ARTICLE III COURTS TO ACCORD DEFERENCE TO A STATE COURT'S RULINGS ON MATTERS OF FEDERAL CONSTITUTIONAL AND STATUTORY LAW.

This Court should reject a reading of AEDPA that requires an Article III court to defer to state court decisions on matters of federal law, because adopting that interpretation would upset the delicate balance created by the Framers in Article III of the United States

Constitution.[2] *See Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."). In relevant part, Article III reads:

> Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .
>
> Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .

U S. Const. art. III, §§ 1, 2.

The "judicial Power" of an Article III court cannot be limited in the way dictated by the Fourth Circuit. The Framers never intended for a federal court to defer to a state court decision on matters "arising under this Constitution [and] the Laws of the United States." Instead, as revealed in the debates at the Constitutional Convention, the Framers intended that federal courts, once vested with jurisdiction to exercise the "judicial Power," would preserve

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[2] Section 2254(d)(1) of AEDPA states that a writ of habeas corpus "shall not be granted" by a federal habeas court unless the ruling in the underlying state court action "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The Fourth Circuit below read this provision "to prohibit the issuance of the writ unless (a) the state court decision is in 'square conflict' with Supreme Court precedent that is controlling as to law and fact or (b) if no such controlling decision exists, 'the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant [S]upreme [C]ourt precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts.'" *Williams v. Taylor*, 163 F.3d 860, 865 (4th Cir. 1998). "In other words, habeas relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable." *Id.*

federal law as "the supreme Law of the Land." The exercise of that "judicial Power" mandates that the federal court -- in cases under AEDPA, the federal district court on habeas review -- conduct an independent, complete, and *de novo* review of state court rulings on federal constitutional and statutory law and issue relief sufficient to maintain the supremacy of that law.

A. This Court Has Long Turned To The Records Of The Constitutional Convention To Discern The Framers' Intent.

In May 1787, delegates from the original thirteen states gathered in Philadelphia, Pennsylvania to begin the process of crafting a new constitution. Their debates reflect the concerns and intentions of the exclusive set of individuals who ultimately determined the composition and substance of the Constitution. *See* Jack N. Rakove, *Original Meanings* 13 (1996) (hereinafter "Rakove, *Original Meanings*"). "The absence of any accepted agenda prior to the opening of debates in late May 1787 and the fact that the delegates came to Philadelphia essentially uninstructed by their legislative constituents make the internal deliberations of the Convention the first and most salient set of sources for the original meaning of the Constitution." *Id.* Thus, the records of the Constitutional Convention are "surely among the best places to begin an examination of original understanding." Henry Paul Monaghan, *We the Peoples, Original Understanding, and Constitutional Amendment*, 96 Colum. L. Rev. 121, 139 (1996); *see also* Rakove, *Original Meanings*, at 13 (debates from the Constitutional Convention are the "obvious point of departure" in any examination of the Framers' intent).

This Court has recognized the important role the records of the Constitutional Convention play in examining the Framers' intent. In *INS v. Chadha*, 462 U.S. 919 (1983), for example, this Court considered the Convention debates in striking down the section of the Immigration and Nationality Act that authorized one House of Congress to veto by resolution the decision of the Executive Branch to allow a deportable alien to remain in the United States. This Court found that "[t]he records of the Constitutional Convention

reveal that the requirement that all legislation be presented to the President before becoming law was uniformly accepted by the Framers." *Id.* at 946. In holding that Congress must comply with this explicit constitutional standard, this Court stated that "[t]he choices we discern as having been made in the Constitutional Convention imposed burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked." *Id.* at 958; *see also New York v. United States*, 505 U.S. 144, 162-66 (1992) (deriving the Framers' intent from the records of the Constitutional Convention); *Buckley v. Valeo*, 424 U.S. 1, 129 (1976) ("The debates during the [Constitutional] Convention . . . seem to us to lend considerable support to our reading of the language of the Appointments Clause itself."); *Powell v. McCormack*, 395 U.S. 486, 532-41 (1969) (relying on the records of the Constitutional Convention and, in particular, those of the Convention's Committee of Detail).

The central question before the Court in this case -- the extent to which Congress may direct the federal courts, exercising the "judicial Power" under Article III and in keeping with the Supremacy Clause, to defer to the rulings of state courts on matters "arising under" federal law -- was the subject of careful consideration at the Constitutional Convention. Thus, the Convention records provide an "obvious point of departure" here. *See* Rakove, *Original Meanings*, at 13.

B. The Convention Records Reveal That The Framers' Constitutional Design Forbade Federal Courts, Exercising The "Judicial Power," To Defer To State Court Decisions On Matters "Arising Under" Federal Law.

During the Constitutional Convention, the Framers wrestled with several vital questions before finally drafting what is now Article III. Early debate focused on whether the national legislature or the judiciary would shoulder primary responsibility for guaranteeing the supremacy of national law. If the task were

entrusted to the judiciary, the Framers had to determine whether the task could be accomplished by a single Supreme Court, or whether additional "inferior" federal courts were needed. Upon deciding the form of the federal judiciary, the establishment of federal courts' potential jurisdiction also would play a key role in defining the scope of the judiciary's power. And, finally, it was necessary for the Framers to determine what power a federal court would exercise when granted jurisdiction, and whether Congress could limit that power. The Framers' answers to these questions were the product of considerable debate and compromise.

1. The Opening Days of the Convention, and the Virginia Plan.

The Constitutional Convention opened on May 29, 1787, with the failed Articles of Confederation providing the backdrop; in the words of delegate James Wilson, "the business of this convention" was "to correct vices" of the Articles of Confederation. *See* 1 *The Records of the Federal Convention of 1787*, at 20-22 (Max Farrand ed., 1911) (June 8, 1787) (hereinafter "*Records of the Convention*"). "One of [the Articles'] vices [wa]s the want of an effectual controul in the whole over its parts." *Id.*

James Madison also recognized that the failings of the first Union and the need for a new Constitution were largely the result of the states' abusive laws and disregard for national authority under the Articles. *See* Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* 76, 107 (1995) (noting Madison's "alarm about abuses in the states . . . [which he] traced to the debilities of the Confederation"). "At the heart of Madison's thinking lay a deep concern with the process by which laws were enacted, enforced, and obeyed, and an overriding conviction that the legislatures created by the state constitutions of 1776 had failed to discharge their duties fairly and responsibly."

Jack N. Rakove, *James Madison and the Creation of the American Republic* 45 (1990) (hereinafter "Rakove, *James Madison*").[3]

Thus, when the Constitutional Convention opened, Madison championed a broad set of proposals to address the abuses by the states. These proposals, introduced on the first day of the Convention as part of Edmund Randolph's "Virginia Plan," were primarily designed to constrain the states' tendency to act in disregard of the law of the Union. 1 *Records of the Convention*, at 20-22 (May 29, 1787); Letter from James Madison to Edmund Randolph (Apr. 8, 1787), *in* 9 *The Papers of James Madison 9 Apr. 1786-24 May 1787*, at 368-70 (Robert A. Rutland et al. eds., 1975); *see also New York v. United States*, 505 U.S. 144, 164 (1992) (noting prominence of the Virginia Plan in the Convention debates). As set forth in the Virginia Plan, Madison envisioned both a legislative and judicial means of accomplishing this goal, proposing that (1) a federal judiciary, consisting of both a Supreme Court and inferior courts, be formed with the power to resolve all questions of national "law"; and (2) the new Congress be given a "negative" -- that is, the power to veto any state law found by Congress to contravene the national interest. *See* Rakove, *James Madison*, at 51.

Madison's proposals provided the framework for the Convention's early debates, as the Committee of the Whole, consisting of the entire membership of the Convention, considered the Virginia Plan. Although the Committee ultimately changed many details of Madison's plan, "[i]t did so following a pattern . . . that persisted throughout the Convention -- the dilution of Madison's nonjudicial constraints in favor of some form of review by federal judges whose independence from political influences and other 'judicial' qualities were strictly protected." James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum.

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[3] Madison was the "leader" of the Constitutional Convention, *Myers v. United States*, 272 U.S. 52, 115 (1926), and may justly be called the "father of the Constitution." *West Lynn Creamery v. Healy*, 512 U.S. 186, 193 n.9 (1994); *see also Printz v. United States*, 521 U.S. 898, 910-15 (1997) (relying on Madison's writings).

L. Rev. 696, 715 (1998) (hereinafter "Liebman & Ryan"); *see also* Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 46-48 & n.81 (1981) (hereinafter "Sager") (noting that "judicial supervision [was] the Convention's chosen means of controlling the states").

Madison's proposed legislative negative suffered a quick death at the Convention due to fears that it would allow Congress to "enslave the States." 1 *Records of the Convention*, at 162-63, 165, 168 (June 8, 1787) (statement of Elbridge Gerry). Preferring a different mechanism for assuring the supremacy of federal law, the delegates immediately followed the negative's defeat with the unanimous adoption of a Supremacy Clause, binding all courts, and most particularly the state courts, to the principle that federal law constituted "the supreme law" of the land. 2 *Records of the Convention*, at 28-29 (July 17, 1787); *see also* Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 Stan. L. Rev. 1031, 1047 (1997) (hereinafter "Rakove, *Origins of Judicial Review*") (linking the negative's defeat and the advent of the Supremacy Clause).[4]

The defeat of the legislative negative reflected the Framers' desire to have the judiciary, rather than the legislature, guarantee the "supremacy" of federal law. As Gouverneur Morris argued, the legislative negative was unnecessary because the state courts' obligations under the Supremacy Clause, coupled with federal judicial review of state decisions and national legislative powers, would suffice. 2 *Records of the Convention*, at 28 (July 17, 1787). The concept of a legislative negative was reintroduced several times during the Convention. *See id.* at 27-28, 382-91. Each time, the

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[4] In its initial form, the Supremacy Clause applied only to "Acts [of Congress] and Treaties." Rakove, *Original Meanings*, at 172-73 (quoting Article 6 of the New Jersey Plan). Over the course of the Convention, the delegates followed their pattern of establishing effective federal judicial review by significantly broadening the scope of the Supremacy Clause, amending the Clause to cover "the Constitution." *Id.* at 173-74 (noting Committee of Detail's revisions).

negative was defeated based on a preference for judicial means for constraining the states' power. *See id.* at 21-22, 28, 382, 391.[5]

2. The Form and Role of the Federal Judiciary.

Given doubts about the legislative negative, and a preference for entrusting the enforcement of the supremacy of federal law to the federal judiciary, the Framers shifted to addressing the structure of that judiciary. The initial debates focused on whether the federal judiciary should consist solely of one Supreme Court, or whether there was a need to establish inferior federal courts. 1 *Records of the Convention*, at 119, 124 (June 5, 1787).

Many of the delegates who favored a weaker federal government argued that state courts should serve as the court of original jurisdiction in all cases arising under national law, and that a single federal Supreme Court exercising mandatory appellate jurisdiction in all cases could keep the state courts in check without the help of appellate review by "inferior" federal courts. *See* 1 *Records of the Convention*, at 119, 124-25 (June 5, 1787) (statements of John Rutledge and Roger Sherman). Neither these nor any other delegates objected, however, to the general principle that the federal judiciary should have appellate jurisdiction to "assur[e] . . . the supremacy and uniformity of federal law in cases decided by the state courts." Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 Vill. L. Rev. 1030, 1038-39 (1982); *see also* Liebman & Ryan, at 718 (emphasis in original) ("[w]hat was not at issue was *whether* the national government should have authority to assure supremacy of national law over state law," but how that authority would be divided among the federal judiciary). "It was plainly not intended that the system

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[5] *See also* 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 554 (1866) (June 20, 1788 statement of John Marshall at Virginia ratifying convention) ("To what quarter will you look for protection from an infringement on the Constitution, if you will not give that power to the judiciary?").

could work effectively with the state courts as courts of *last* resort on issues of federal law." Bator, at 1038-39.[6]

Madison and his allies, however, doubted the ability of a single Supreme Court to handle the burden of mandatory appellate jurisdiction from all state court rulings, and thus feared that the proposed approach would not effectively constrain unjust state laws. 1 *Records of the Convention*, at 124-25 (June 5, 1787); *see also* Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 *The Papers of James Madison 27 May 1787-3 Mar. 1788*, at 211 (Robert A. Rutland et al. eds., 1977). Madison and his allies were also convinced that politically vulnerable state judiciaries could not effectively police state law, and could not be expected to follow and enforce federal law, without the backstop provided by accessible and effective federal judicial review. *See* 1 *Records of the Convention*, at 124 (June 5, 1787) (Madison: "What was to be done after Improper Verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury?"). The result of this initial round of debates was the "Madisonian Compromise." Madison proposed, and the Convention approved, abandoning mandatory appellate jurisdiction in the Supreme Court in favor of allowing Congress to "appoint inferior Tribunals" and grant those courts original federal jurisdiction. *Id.* at 118, 125.[7]

Notably, Madison and the federalists, who favored expansive federal court jurisdiction, agreed to leave to Congress the power to

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[6] By "appellate," the Framers did not mean the hierarchical system of courts that the term connotes today. Instead, the Framers used the term functionally to mean simply one court's review of the decision of another court. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 337-39 (1816); *see also Felker v. Turpin*, 518 U.S. 651, 658-62 (1996).

[7] Later in the Convention, the word "appoint" was changed to "establish," removing any connotation that Congress could or should designate existing state courts as federal courts to hear federal disputes. *See* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 Wis. L. Rev. 39, 124-26; 1 Julius Goebel, Jr., *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* 211-12 (1971).

create the "inferior" federal courts only because they expected that Congress *would* exercise that power. As Madison understood, if any branch of government would be disposed as a matter of its own ambitions to expand national power -- and, in the process, to expand national judicial authority to facilitate that power -- it would be Congress. *See The Federalist No. 47*, at 309-10 (Isaac Kramnick ed., 1987) (Madison: "The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex. . . ."). This same reasoning led anti-federalist opponents of the Constitution, fearing broad federal court jurisdiction, to argue that placing a nationally ambitious Congress in charge of the grant of this jurisdiction was putting the fox in charge of the chicken coop. *See* Rakove, *Origins of Judicial Review*, at 1050 (citing "Brutus," Essay I, N.Y.J., Oct. 18, 1787, *reprinted in* 2 *The Complete Anti-Federalist* 363, 365-68 (Herbert J. Storing ed., 1981)); *see also* Herbert Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1006 (1965) ("[G]overnments cannot be run without the use of courts for the enforcement of coercive sanctions and within large areas it will be thought that federal tribunals are essential to administer federal law. . . . The withdrawal of such jurisdiction would impinge adversely on so many varied interests that its durability can be assumed."). Thus, delegates on both sides of the debate understood the Madisonian Compromise as effectively guaranteeing the establishment of "inferior" federal courts.

3. The Jurisdiction of the Federal Judiciary.

The delegates understood that as a result of the Madisonian Compromise, and the need to spread out the Supreme Court's checking function across the entire federal judiciary, the lower federal courts were likely to be given significant jurisdiction to review state court decisions. Thus, shortly after the Madisonian Compromise, the delegates adopted Randolph's and Madison's proposal to delete the Virginia Plan's restriction of the Supreme Court to appellate jurisdiction and of the lower federal courts to original jurisdiction. 1 *Records of the Convention*, at 238 (June 13, 1787); *cf. id.* at 21-22. The new jurisdictional provision, defining the "jurisdiction of the national Judiciary" as a whole, created the

possibility that Congress would grant the Supreme Court original jurisdiction and, more important for this case, would grant the inferior federal courts jurisdiction to review state decisions. *Id.*

With this success in hand, the focus of Madison and the other delegates turned from whether the federal courts -- both Supreme and inferior -- would review state court judgments to what the nature of that review would be. The delegates first unanimously agreed to broaden the jurisdictional provision's original category of cases, which related only to the "collection of the Natl. revenue," to include all "cases arising under laws passed by the general Legislature." 2 *Records of the Convention*, at 39 (July 18, 1787); *see also id.* at 172-73 (Aug. 6, 1787) ("arising under" language of final report of the Committee of Detail). The delegates then unanimously expanded the jurisdictional provision again, this time changing the "arising under the laws passed by the general Legislature" clause to include cases "arising under" "this constitution." As delegate Rutledge stated in proposing this change, it was specifically intended to conform the "federal question" jurisdiction of the federal judiciary to the Supremacy Clause duties of state judges, and thereby to confirm the federal court's power and responsibility in cases within their jurisdiction to assure state judicial compliance with those duties. *Id.* at 422-24, 428, 430-31 (Aug. 27, 1787).

Years later, in an 1823 letter to Thomas Jefferson, Madison examined this link between the "federal question" jurisdiction of the federal judiciary and the responsibilities of the state courts. Rejecting the Virginia Court of Appeals' claim that the Supreme Court of the United States was not authorized to review state court decisions, Madison wrote:

> Believing as I do that the General Convention regarded a provision within the Constitution for deciding in a peaceable & regular mode all cases arising in the course of its operation, as essential to an adequate System of Govt. that it intended the Authority vested in the Judicial Department as a final resort in relation to the States, for cases resulting to it in the exercise of its functions, (the concurrence of the Senate chosen by the State Legislatures, in appointing the Judges, and the oaths & official

> tenures of these, with the surveillance of public Opinion, being relied on as guarantying their impartiality); and that this intention is expressed by the articles declaring that the federal Constitution & laws shall be the supreme law of the land, and that the Judicial Power of the U.S. shall extend to all cases arising under them . . . thus believing I have never yielded my original opinion indicated in the "Federalist" No. 39 . . . .[8]

Letter from James Madison to Thomas Jefferson (June 27, 1823), *in* 4 *Records of the Convention*, at 83-84.

4. The "judicial Power."

At the end of July 1787, the Convention formed the Committee of Detail to report a Constitution based on the debates thus far concluded. 2 *Records of the Convention*, at 85-86, 95-97, 106 (July 23-24, 1787). The Wilson-Rutledge Draft for the Committee, virtually identical to the final Committee report, contained the first reference to the "[j]udicial Power of the United States." *Id.* at 172-73 (Aug. 6, 1787). The draft and the subsequent report stated that the "[j]udicial Power" -- now codified in Sections 1 and 2 of Article III of the Constitution -- would be vested in the Supreme Court and such inferior courts as Congress might create. *Id.* The draft clearly differentiated this "judicial Power" (which "shall extend" to all federal judges) from the "jurisdiction" of the federal courts (which was separately listed and left largely to Congress to decide whether to confer and on what courts). *Id.*

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[8] Madison used *The Federalist No. 39* to address the states' fears concerning federal jurisdiction over disputes between the states and the federal government. In doing so, he spoke to the qualitative attributes of the "judicial Power":

> [I]n controversies relating to the boundaries between the two jurisdictions, the tribunal which is *ultimately to decide* is to be established under the general government. But this does not change *the principle of the case*. The decision is to be *impartially made*, according to the *rules of the Constitution*; and all the *usual and most effectual precautions* are taken to secure this *impartiality*.

The Federalist No. 39, at 258 (James Madison) (Isaac Kramnick ed., 1987) (emphasis added).

Significant time during the remaining days of the Convention was dedicated to defining -- and defending -- this "judicial Power." The Framers, for example, rejected several proposals to weaken or eliminate the federal judicial independence and insulation from political control that the Framers had placed at the inviolable core of the "judicial Power." The Committee of Detail rejected an early proposal that would have required federal courts, exercising the "judicial Power," to issue advisory opinions at the behest of the political branches. 2 *Records of the Convention*, at 334-37, 341-43, 367 (Aug. 20-22, 1787). After the Committee of Detail reported to the Convention, the delegates also rejected all attempts to place limits on the cases to which the "Power" applied, such as by limiting it to cases in law or equity. *Id.* at 422, 425, 428, 621.

Perhaps most important for this case, the delegates rejected attempts to limit federal courts' power to decide the whole case -- by confining their duties to selected parts of it -- or to effectuate their decisions. Rejected, for example, were motions to limit federal appeals to construing purely legal provisions, rather than applying the law to the facts to resolve the case, and to limit federal decisions to matters of "law" rather than to matters of "law and fact." 2 *Records of the Convention*, at 424, 427 (Aug. 27, 1787); *see also id.* at 431 (Wilson's view that the appellate jurisdiction conferred by his existing Committee of Detail draft already was intended to reach the whole case). The Framers also rejected the New Jersey Plan's proposal to limit federal appellate jurisdiction over state "arising under" cases to the rendering of abstract opinions on the "construction" of federal law, while giving state courts the exclusive power to apply the law to the facts to reach a decision. *See* 1 *Records of the Convention*, at 243-45 (July 15, 1787) (listing New Jersey Plan's judiciary resolutions). Most crucially, the delegates specifically rejected proposals that "the judicial Power shall be exercised in such manner as the Legislature shall direct" or (in regard to lower courts) "in the manner, and under the limitations which [the Legislature] shall think proper." 2 *Records of the Convention*, at 425, 431 (Aug. 27, 1787).

The defeat of these proposals -- the last one in particular -- reaffirmed the Framers' insistence that, once the Congress created

inferior courts and gave them jurisdiction, it could not limit or direct the courts' exercise of the "judicial Power." *See* Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 Cath. U. L. Rev. 671, 733 (1997) (defeated "proposal was dangerously susceptible to abuse, for it gave Congress plenary authority not only over *jurisdiction*, but over the *judicial* power" and "might have empowered Congress to dictate . . . how [federal courts] should decide . . . cases").

5. Conclusion: The Framers' Intent.

To rectify the "vices" of the states under the Articles of Confederation, the Framers opted for a federal judicial, rather than legislative, review of state law and state court decisions to guarantee their consistency with national law. Toward that end, the Framers provided for a federal judiciary, consisting of a Supreme Court and inferior courts, which the Framers expected to exercise wide-ranging jurisdiction to review state decisions pursuant to the anticipated grant of power from a nationally ambitious Congress. Concerning the scope of that review, the intent of the Framers is clear: once Congress "ordain[s] and establish[es]" a federal court, that court exercises the "judicial Power of the United States." The "judicial Power," in turn, mandates that the federal court decide the whole federal question -- applying the law, as well as interpreting it -- based on the whole national law. Moreover, the federal court's decision cannot be limited to an advisory function: the Framers intended that the federal courts have the power to effectuate their decisions, thus making the "judicial Power" an "effectual power." *The Federalist No. 80*, at 445 (Alexander Hamilton) (Isaac Kramnick ed., 1987). In the words of Alexander Hamilton, the Framers "le[ft] the door of appeal as wide as possible" whenever Congress opened it. *The Federalist No. 81*, at 454 (Isaac Kramnick ed., 1987). The Framers considered -- and *rejected* -- any "limitation" on the federal judiciary's exercise of the "judicial Power," including the specific rejection of a proposal that would have allowed Congress to "direct" the exercise of the "judicial Power." 2 *Records of the Convention*, at 425 (Aug. 27, 1787).

II. THIS COURT HAS HELD THAT AN ARTICLE III COURT, EXERCISING THE "JUDICIAL POWER," CANNOT BE DIRECTED TO DEFER OR GIVE EFFECT TO A STATE COURT'S ERRONEOUS RULING OF LAW.

In its decisions, this Court has sedulously enforced the Framers' conception of the inviolable "judicial Power," holding that once an Article III court is "called into existence and vested with jurisdiction," that court "become[s] possessed of the [judicial] power." *Michaelson v. United States*, 266 U.S. 42, 65-66 (1924). Once so vested, "the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative." *Id.* Among other things, this Court has forbade Congress to grant jurisdiction, and then order the Article III court to limit its ruling, by (1) deferring to Congress's or anyone else's determination that the state law or decision does not violate federal law; (2) deciding the case under any rule other than the "supreme Law of the Land"; or (3) deciding that a state law or decision violates the "supreme law," but nevertheless withholding relief sufficient to deny effect to the offending law. *E.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858); *Crowell v. Benson*, 285 U.S. 22 (1932); *see* Sager, at 69-74. In these and other cases, this Court has preserved the power of the Article III courts independently to interpret the entire law in deciding the "whole" case and in effectuating their rulings. *See* David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 B.Y.U.L. Rev. 75, 134 ("Article III is a mandate 'to vest the whole judicial power.'") (quoting *Martin*, 14 U.S. (1 Wheat.) at 330).

A. This Court Has Long Guarded The "Judicial Power" From Unconstitutional Infringements.

The seminal case of *Marbury v. Madison* immunized all these aspects of the "judicial Power" from diminution by Congress.

5 U.S. (1 Cranch) 137 (1803). The *Marbury* Court reviewed section 13 of the 1789 Judiciary Act, which purported to confer original mandamus jurisdiction on this Court, and held that this grant of jurisdiction was "not . . . warranted by the constitution." *Marbury*, 5 U.S. (1 Cranch) at 174-76. In doing so, this Court rejected the view that an Article III court must defer to Congress's interpretation of the Constitution. William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 Duke L.J. 291, 314 (1996) ("The [*Marbury*] Court inquired into the constitutional interpretation on which the Judiciary Act depended for its validity; it took Congress's view into account . . . disagree[ing] with that interpretation (such as it was, as made by Congress); and it accordingly found that Congress had acted without authority . . . ."). Rather, an Article III court exercising the "judicial Power" is "requir[ed to exercise] independent judgment, not deference, when the decisive issue turns on the meaning of the constitutional text." Henry Paul Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 6, 9 (1983).

The *Marbury* Court also rejected the argument that Congress could direct Article III courts, faced with a statute in conflict with the Constitution, to "close their eyes on the constitution" and choose the statute as the rule of decision. *Marbury*, 5 U.S. (1 Cranch) at 177-79. In the words of Chief Justice Marshall, "[i]t is emphatically the province and duty of the judicial department to say what the law is . . . . If two laws conflict with each other, the courts must decide on the operation of each." *Id.* at 177. This, the Chief Justice said, is "the very essence of judicial duty." *Id.* at 178.

Finally, the Court refused in *Marbury* to rule that, so long as Article III courts can express an independent opinion on all legal issues in the case, Congress may deny them the power to effectuate their opinions by forbidding them to order relief. After holding section 13 of the Judiciary Act unconstitutional, the Court ruled that the statute was "absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign," and "discharged" the petition filed under it. *Marbury*, 5 U.S. (1 Cranch) at 173. Thus, the "judicial Power of the United States"

includes the power independently to decide a case properly before the court, to decide it in accordance with the "supreme Law of the Land," and to grant such relief as is necessary to effectuate the court's legal judgment.[9]

In *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), this Court reaffirmed the conclusions reached in *Marbury*. *Klein* was a suit to recover property confiscated by the Union Army during the Civil War. Although certain Acts of Congress barred recovery for persons who had been disloyal to the Union, this Court, in *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870), had implied in the previous Term that Article II of the Constitution required persons who had obtained presidential pardons to be treated as if they had been loyal. In response, Congress passed an Act (1) forbidding the Court of Claims, or any appellate court, to admit a pardon as evidence of loyalty; (2) requiring the Supreme Court to dismiss for want of jurisdiction any appeal of a case in which a pardon had been used as proof of loyalty; (3) making acceptance of a pardon conclusive proof of disloyalty; and (4) divesting courts of jurisdiction upon being presented with proof of a pardon. *Klein*, 80 U.S. (13 Wall.) at 143-44 (citing Act of July 12, 1870, ch. 251, 16 Stat. 230, 235).

In *Klein*, this Court unanimously held that each of the Act's mechanisms, designed to keep an Article III court vested with jurisdiction from effectually ordering legally mandated compensation for seized property, violated Article III as an infringement on the "judicial Power." *Klein*, 80 U.S. (13 Wall.) at 145-47; *id.* at 148 (Miller, J., concurring). This Court noted that Congress could have withheld jurisdiction entirely, or invoked sovereign immunity from the outset. *Id.* at 145. But having conferred jurisdiction and waived immunity, Congress could not

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[9] As the *en banc* Ninth Circuit read *Marbury*, in a decision by then-Judge Kennedy: "If the essential, constitutional role of the judiciary is to be maintained, there must be both the appearance and *the reality* of control by Article III judges over the interpretation, declaration, *and application* of federal law." *Pacemaker Diagnostic Clinic of America, Inc. v. Instro-Medix*, 725 F.2d 537, 544 (9th Cir.) (*en banc*), *cert. denied*, 496 U.S. 826 (1984) (emphasis added).

direct an Article III court's exercise of the "judicial Power." The Court began by rejecting the view that by forbidding courts to consider evidence of pardons, Congress could stop federal courts from determining Article II's impact on the case:

> [T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We had already decided that it was our duty to consider them and give them effect . . . .

Id.

The *Klein* Court next held that Congress could not tell an Article III court how to interpret the Constitution. The Act's directive to Article III courts to treat pardons issued pursuant to Article II as conclusive proof of disloyalty "passed the limit which separates the legislative from the judicial power." *Id.* at 147.

Finally, the Court expressly rejected Congress's attempt to forbid an Article III court from granting the relief needed to effectuate its independent judgment. To thwart that attempt, the Court struck down the Act's provision requiring an Article III court to divest itself of jurisdiction, or accept Congress's midstream invocation of sovereign immunity, at a point where the court determined that the Article II pardon would otherwise mandate relief. *Klein*, 80 U.S. (13 Wall.) at 146-47; *see* Sager, at 87-88 (identifying an "objection to legislation that . . . deprives [Article III courts] of jurisdiction to provide effective relief . . . at the very heart of . . . *Klein*").

Thus, as *Marbury* establishes and *Klein* reiterates, Congress cannot qualify the Article III court's responsibility to decide a case independently, to base that decision on federal constitutional and statutory law, and to issue relief sufficient to effectuate its legal judgment.

B. This Court Has Consistently Held That An Article III Court Cannot Be Limited In The Exercise Of The "Judicial Power" When Reviewing State Court Decisions.

1. Applying *Marbury* to Federal Judicial Review of State Court Decisions: *Cohens v. Virginia*.

In *Marbury* and *Klein*, this Court established that an Article III court may not defer to Congress in interpreting the Constitution in a case within the court's jurisdiction. Similarly, in *Cohens v. Virginia*, this Court held that once jurisdiction is granted, an Article III court may not defer to a state court interpretation of the federal Constitution, nor may the Article III court be deprived of the power to effectuate its own interpretation directly against the parties or, if need be, against the state court by binding it to abide by the federal judgment. 19 U.S. (6 Wheat.) 264 (1821). In *Cohens*, the State of Virginia questioned the need for federal courts to reverse state court decisions in any particular instance in which jurisdiction existed, citing the fact that federal courts do not have jurisdiction over all cases involving possible constitutional claims. *Id.* at 404-05. The state argued (precisely as the Fourth Circuit has ruled in this case) that reversal was necessary only in those "extreme and improbable" cases where a state court blatantly disregarded federal law. *Id.*; *see also id.* at 304-07 (argument of counsel).

Writing for the Court, Chief Justice Marshall acknowledged that Article III "does not extend the judicial power to every violation of the constitution which may possibly take place." *Cohens*, 19 U.S. (6 Wheat.) at 405. Still, the Chief Justice concluded that "if, in any controversy depending in a court, the cause shall depend on . . . [federal] law, that would be a case . . . to which the judicial power of the United States would extend." *Id.* at 405. Thus, the Chief Justice reasoned that the existence of jurisdiction obliged the federal court to decide the whole federal issue, no matter how close

or difficult it may be, in accordance with the court's independent application of federal law:

> It is most true that this Court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. *With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us.* We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. *Questions may occur which we would gladly avoid; but we cannot avoid them.* All we can do is, to exercise our best judgment, and conscientiously perform our duty.

Id. at 404 (emphasis added). The Court in *Cohens* further concluded that, to effectuate its view of the bearing of federal law on the case, the federal court has to possess the power to issue a binding judgment. *Id.* at 382-83, 413-15, 419, 421-22.[10]

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[10] As noted in *Klein*, 80 U.S. (13 Wall.) at 145, Congress sometimes withholds federal jurisdiction to review state court decisions -- a limitation that litigants cannot circumvent by using grants of general jurisdiction to obtain review of state decisions. *See, e.g.*, Full Faith and Credit Act, 28 U.S.C. § 1738; Anti-Injunction Act, 28 U.S.C. § 2283. Congress also can limit the relief that a federal court may order. *See, e.g.*, Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1366 (1953) ("The denial of *any* remedy is one thing . . . . [b]ut the denial of one remedy while another is left open . . . can rarely be of constitutional dimension."); *see also Monell v. Department of Social Serv.*, 436 U.S. 658, 690-91 (1978) (damages *are* available if decisionmaker is implementing or executing policy). But Congress cannot grant an Article III court the jurisdiction to review state legal decisions and then direct that court to give effect to state decisions that are contrary to federal law. *Yakus v. United States*, 321 U.S. 414, 468 (1943) (Rutledge, J., dissenting) ("It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instance may be the same thing, without regard to them.").

2. The "Paramount Judicial Authority" of Article III Courts: *Martin* and *Ableman*.

In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), this Court also embraced the principle that an Article III court must have the power to deny effect to state decisional law that, in the federal court's independent judgment, offends the Constitution. *Martin* concerned the Virginia Court of Appeals's refusal to enforce this Court's mandate in an earlier appeal from the Virginia Court of Appeals. The Virginia court decided not to follow the mandate because, in its judgment, this Court's decision was erroneous and beyond its competence. *See Hunter v. Martin*, 18 Va. (4 Munf.) 1, 49-50, 59 (1814). This Court ruled, however, that state courts lack authority, either directly or by ignoring this Court's mandate, to "revise [this Court's] own judgments." *Martin*, 14 U.S. (1 Wheat.) at 355.

This Court extended the same principle to lower federal court judgments in *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858), where the Wisconsin Supreme Court had twice granted a federal prisoner a state writ of habeas corpus to free him from federal incarceration. Understanding the Wisconsin court's decision as an assertion of power to review the federal district court's judgment that the Fugitive Slave Act under which the prisoner was convicted was constitutional, this Court ruled that the federal district court "had exclusive and final jurisdiction by the laws of the United States; and neither the regularity of its proceedings, nor the validity of its sentence could be called into question in any . . . court . . . of a State . . . ." *Ableman*, 62 U.S. (21 How.) at 526. The Wisconsin court's decision, which effectively constituted state court review of a federal court decision, thus was invalid because it interfered with the federal district court's exercise of the "judicial Power":

> It has not only reversed and annulled the judgment of the District Court of the United States, but it has reversed and annulled the provisions of the Constitution itself, . . . and made

> the superior and appellate tribunal the inferior and subordinate one.

Id. at 522-23.

Martin and *Ableman* established that a state court cannot ignore or revise the judgment of an Article III court after-the-fact. This rule also applies with equal force where Congress has directed that an Article III court give the state court the last word on issues of federal law by deferring before the fact to a state court ruling. As this Court has repeatedly held throughout its history, all restraints on the "judicial Power" are indistinguishable in kind and therefore equally invalid:

> If the legislature cannot thus indirectly control the action of the courts, by requiring them a construction of the law according to its own views, it . . . plain[ly] cannot do so directly, by setting aside their judgments, compelling them to grant new trials, [or] ordering the discharge of [judicially convicted] offenders. . . .

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218, 225 (1995) (quoting Thomas Cooley, *Constitutional Limitations* 94-95 (1868)); *accord Clinton v. Jones*, 520 U.S. 681, 699-70 & n.31 (1997); *United States v. Sioux Nation*, 448 U.S. 371, 398 (1980); *Klein*, 80 U.S. (13 Wall.) at 145.

3. The "judicial Power" and Mixed Questions of Law and Fact: *Crowell* and its Progeny.

The basic contours of the "judicial Power" -- established by the Framers, affirmed by this Court in *Marbury* and *Klein*, and applied in *Cohens*, *Martin*, and *Ableman* to federal review of state court decisions -- mandate *independent* and *effectual* federal review of state court decisions whenever jurisdiction to review those decisions is granted. As the Framers themselves insisted, *see supra* Section I.B.4, this is true whether the Article III court is examining a state court ruling on a purely legal question or on a "mixed question of law and fact." Following this dictate, the Court repeatedly has held that, just as an Article III court may not defer to a state court ruling

on matters of pure "law," the Article III court likewise must independently review a state court's determination on "mixed questions of law and fact" whenever it implicates the meaning of federal law.

The Court enforced this rule in *Crowell v. Benson*. There, the Court addressed whether an Article III court can be required to defer to a prior administrative determination as to mixed questions of law and fact -- and thus exercise something less than independent and plenary review of those questions. The Court held that an Article III court could not do so:

> [T]he question is [one] . . . of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. . . . That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.
>
> In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.

285 U.S. 22, 56-57, 60 (1932).

Although *Crowell* involved judicial review of an administrative determination, this Court shortly thereafter held that an Article III court similarly must engage in plenary review of *state court* determinations of mixed questions of law and fact. According to this Court, anything less than independent, plenary review would restrain an Article III court from "perform[ing its] own proper

function in deciding the question of law arising upon the findings which the evidence permits." *United Gas Pub. Serv. Co. v. Texas*, 303 U.S. 123, 143 (1938); *see Norris v. Alabama*, 294 U.S. 587, 590 (1935) (in justifying its independent review of a state court's mixed "voluntary confession" conclusion, this Court held that "whenever a conclusion of law . . . as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."); *Gallegos v. Nebraska*, 342 U.S. 55, 61 (1951) ("[Because Article III judges] ha[ve] been entrusted with power to interpret and apply our Constitution to the protection of the right of an accused to federal due process in state criminal trials, . . . [a] contrary rule would deny to the Federal Government ultimate authority to redress a violation of constitutional rights."); *Pierre v. Louisiana*, 306 U.S. 354, 358 (1939) (reaffirming principle that Article III courts have a "*solemn duty* to make independent inquiry and determination of [any] disputed facts") (emphasis added).

The rule established in this line of cases -- that an Article III court may not defer to a state court decision on matters of law, or on mixed questions of law and fact -- also applies in the context of habeas review. On habeas review, mixed questions of fact and law generally are treated "as issues of law" for which the Constitution compels plenary federal court review, including of state court determinations. *See Thompson v. Keohane*, 516 U.S. 99, 111 (1995) (noting multiple instances where this Court has treated mixed questions "as issues of law for § 2254 purposes").

If an Article III court defers to a "reasonable" state court decision as to mixed questions of law and fact -- a result that the Fourth Circuit below held is compelled by AEDPA -- that court neglects its constitutional duty to exercise the "judicial Power." As Justice O'Connor wrote in *Wright v. West*, an Article III court cannot "presume the correctness of a state court's legal conclusions on habeas, or [allow] a state court's incorrect legal determination . . . to stand because it was reasonable." 505 U.S. 277, 305 (1992) (O'Connor, J., concurring). Consequently, this Court has "always

held that federal courts, even on habeas, have an independent obligation to say what the law is." *Id.*

4. Conclusion: The "judicial Power" and AEDPA.

The habeas corpus statute requires Article III courts to review state court "decision[s]" to determine whether a prisoner is held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(c)(3), 2254(a) (1994); 28 U.S.C.A. § 2254(d)(1) (West 1994 & Supp. 1998). Despite this grant of federal question jurisdiction -- to which "[t]he judicial Power shall extend" under Article III -- the Fourth Circuit has read AEDPA to severely limit a federal court's habeas review of a prior state court decision. The ruling below requires an Article III court to defer -- either as a matter of legal interpretation or by denying relief necessary to effectuate an independent interpretation -- to a state decision that the federal court finds to be in violation of the Constitution, but that does not rise to the level of outrageous error required by the Fourth Circuit.

This view cannot be squared with the Framers' intent to ensure the supremacy of federal law through plenary, qualitative review of state decisions by Article III courts vested with jurisdiction by Congress. Nor can this view be squared with the Court's prior decisions. Beginning with *Marbury v. Madison* and continuing until today, this Court has held that once vested with jurisdiction, an Article III court must independently review and decide a case based on the "supreme Law of the Land," and must have the ability to grant relief sufficient to effectuate that judgment. An Article III court exercising the "judicial Power," but constrained on habeas review by the Fourth Circuit's interpretation of section 2254(d) of AEDPA, cannot help but "fail of its purpose in safeguarding constitutional rights." *Norris*, 294 U.S. at 590.

CONCLUSION

The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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No. 98-8384

IN THE

Supreme Court of the United States

TERRY WILLIAMS,

Petitioner,

vs.

JOHN B. TAYLOR, Warden, Sussex I State Prison,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. In applying 28 U. S. C. §2254(d)(1), what kinds of challenges to state court decisions are evaluated under "contrary to . . . clearly established Federal law," and what kinds are evaluated under "unreasonable application of clearly established Federal law"?

2. What standard is used to determine if an application is "unreasonable"?

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Almendarez-Torres v. United States, 523 U. S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998) 27

Angel v. Bullington, 330 U. S. 183, 91 L. Ed. 832, 67 S. Ct. 657 (1947) 7

Arizona v. California, 460 U. S. 605, 75 L. Ed. 2d 318, 103 S. Ct. 1382 (1983) 7

Ayala v. Speckard, 131 F. 3d 62 (CA2 1997) 12

Ayala v. Speckard, 89 F. 3d 91 (CA2 1996) 12

Baker v. General Motors Corp., 522 U. S. 222, 139 L. Ed. 2d 580, 118 S. Ct. 657 (1998) 6

Breard v. Greene, 523 U. S. 371, 140 L. Ed. 2d 529, 118 S. Ct. 1352 (1998) 10

Brecht v. Abrahamson, 507 U. S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993) 6, 21, 24

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 437 (1953) 8, 10, 26

Bui v. DiPaolo, 170 F. 3d 232 (CA1 1999) 13, 14

Butler v. McKellar, 494 U. S. 407, 108 L. Ed. 2d 347, 110 S. Ct. 1212 (1990) 23, 25

Canales v. Roe, 151 F. 3d 1226 (CA9 1998) 16, 17

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Christianson v. Colt Indus. Operating Corp., 486 U. S. 800,
100 L. Ed. 2d 811, 108 S. Ct. 2166 (1988) 7

Coleman v. Thompson, 501 U. S. 722, 115 L. Ed. 2d 640,
111 S. Ct. 2546 (1991) 8, 10

Darr v. Burford, 339 U. S. 200, 94 L. Ed. 761,
70 S. Ct. 587 (1950) 9

Drinkard v. Johnson, 97 F. 3d 751 (CA5 1996) 12

Ex parte Hawk, 321 U. S. 114, 88 L. Ed. 572,
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Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717 (1880) 6

Ex parte Watkins, 3 Pet. (28 U. S.) 193,
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Fay v. Noia, 372 U. S. 391, 9 L. Ed. 2d 837,
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Furman v. Wood, 169 F. 3d 1230 (CA9 1999) 17, 23

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Houchin v. Zavaras, 107 F. 3d 1465 (CA10 1997) 17

In re Wood, 140 U. S. 278, 35 L. Ed. 505,
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Jones v. United States, 527 U. S. __
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Kuhlmann v. Wilson, 477 U. S. 436, 91 L. Ed. 2d 364,
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Lambrix v. Singletary, 520 U. S. 518, 137 L. Ed. 2d 771,
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Lindh v. Murphy, 521 U. S. 320, 138 L. Ed. 2d 481,
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Lindh v. Murphy, 96 F. 3d 856 (CA7 1996) 12

Lockhart v. Fretwell, 506 U. S. 364, 122 L. Ed. 2d 180,
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Long v. Humphrey, No. 98-3409 (CA8 July 14, 1999) ... 18

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McCleskey v. Zant, 499 U. S. 467, 113 L. Ed. 2d 517,
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Miller v. Champion, 161 F. 3d 1249 (CA10 1998) 17

Miller v. Fenton, 474 U. S. 104, 88 L. Ed. 2d 405,
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3 L. Ed. 411 (1813) 7

Montana v. United States, 440 U. S. 147,
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Morales v. Calderon, 85 F. 3d 1387 (CA9 1996) 11

Neelley v. Nagle, 138 F. 3d 917 (CA11 1998) 6, 12, 19

---

1. Cases too new to be in the printed F. 3d are cited in a "vendor neutral" format.

Nevers v. Killinger, 169 F. 3d 352 (CA6 1999) 18

Nix v. Whiteside, 475 U. S. 157, 89 L. Ed. 2d 123,
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Patterson v. McLean Credit Union, 491 U. S. 164,
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Pennsylvania v. Bruder, 488 U. S. 9, 102 L. Ed. 2d 172,
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Reed v. Ross, 468 U. S. 1, 82 L. Ed. 2d 1,
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Saffle v. Parks, 494 U. S. 484, 108 L. Ed. 2d 415,
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Salinger v. Loisel, 265 U. S. 224, 68 L. Ed. 989,
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Sanders v. United States, 373 U. S. 1, 10 L. Ed. 2d 148,
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Sawyer v. Smith, 497 U. S. 227, 111 L. Ed. 2d 193,
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Smalls v. Batista, No. 98-2526 (CA2 July 30, 1999) 12

Stone v. Powell, 428 U. S. 465, 49 L. Ed. 2d 1067,
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Strickland v. Washington, 466 U. S. 668,
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Strickler v. Greene, 527 U. S. __, 119 S. Ct. 1936 (1999) 30

Teague v. Lane, 489 U. S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989) 2, 10, 11

Thompson v. Keohane, 516 U. S. 99, 133 L. Ed. 2d 383, 116 S. Ct. 457 (1995) 16, 28

Vendo Co. v. Lektro-Vend Corp., 434 U. S. 425, 54 L. Ed. 2d 659, 98 S. Ct. 702 (1978) 7

Vieux v. Pepe, No. 98-1864 (CA1 July 19, 1999) 14, 24

Williams v. Commonwealth, 360 S. E. 2d 361 (Va. 1987) 1

Williams v. Taylor, 163 F. 3d 860 (CA4 1998) 2

Williams v. Warden, 487 S. E. 2d 194 (Va. 1997) 2, 30

Wright v. West, 505 U. S. 277, 120 L. Ed. 2d 225, 112 S. Ct. 2482 (1992) 2, 5, 9, 13, 16, 20, 21, 22

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139 Cong. Rec. (1993) 4

141 Cong. Rec. (daily ed. June 7, 1995)[2] 3, 4, 8, 18, 21

142 Cong. Rec. (1996) 15, 21, 22

Forsythe, The Historical Origins of Broad Federal Habeas Review Reconsidered, 70 Notre Dame L. Rev. 1079 (1995) 10

Liebman & Ryan, "Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 Colum. L. Rev. 696 (1998) 3, 10, 11, 20, 27, 28

Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229 (1985) 20

Peller, In Defense of Federal Habeas Corpus Relitigation, 16 Harv. C.R.-C.L. L. Rev. 579 (1982) 9

S. 1657, 103d Cong., 1st Sess. (1993) 4

Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888 (1998) ..... Passim

Thompson, Congress OKs Broad Reform of "Great Writ," L. A. Daily Journal, Apr. 19, 1996 11

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2. The daily edition is cited here because the permanent edition for this date is not yet available. Undesignated Congressional Record citations are to the permanent edition.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the proper interpretation of Congress's landmark reform of habeas corpus law in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This law, if properly implemented, will greatly reduce unnecessary delay in the enforcement of capital punishment and reduce the number of correct criminal judgments erroneously overturned on federal habeas. These changes would advance the rights of victims and society which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Fourteen years ago, Terry Williams robbed elderly Harris Stone, striking him on the chest and back with a mattock, killing him. *Williams* v. *Commonwealth*, 360 S. E. 2d 361, 363-364 (Va. 1987). A few months later, he committed "a vicious and brutal malicious wounding of an elderly lady . . . that caused extensive brain damage and left her a 'vegetable.' " *Id.*, at 370. He had an extensive record of other crimes. *Ibid.*

Following affirmance of his death sentence on direct appeal, there was a state habeas proceeding. The principal claim was ineffective assistance of counsel in the penalty phase for failure to present evidence of a " 'deprived and abused upbringing' "

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

and omitting a character witness. *Williams* v. *Warden*, 487 S. E. 2d 194, 197 (Va. 1997). The Virginia Supreme Court rejected the claim, finding that petitioner had not established "a 'reasonable probability' that the result of the proceeding would have been different, nor any probability sufficient to undermine confidence in the outcome." *Id.*, at 199.

On federal habeas, the District Court granted relief, but the Fourth Circuit reversed the grant. *Williams* v. *Taylor*, 163 F. 3d 860, 862-863 (CA4 1998). Applying 28 U. S. C. § 2254(d)(1), the court held that the state court's assessment of reasonable probability was not unreasonable. 163 F. 3d, at 868.

SUMMARY OF ARGUMENT

The new statutory standard is a rule of prior adjudication, *i.e.*, a modified rule of res judicata. It is not a codification or modification of *Teague* v. *Lane*, and that case still applies as an independent limitation. The courts of appeals which have addressed the question have unanimously held that *Wright* v. *West*-type claims, applying settled legal standards to case-specific facts, are evaluated under the "unreasonable application" branch of the statute. The correct method for applying the statute is largely that outlined by the Eleventh Circuit in *Neelley* v. *Nagle*. The statute is constitutional beyond serious question and precludes relief in this case.

ARGUMENT

I. Section 2254(d) is a modified rule of res judicata.

A. Plain Meaning.

Before examining the trees, it is worthwhile to step back and see which forest we are in. The scope and application of a rule are illuminated by the nature of the rule. The scope of *Teague* v. *Lane*, 489 U. S. 288 (1989) was determined in part by its nature as a rule of retroactivity and not a standard of review. See *Wright* v. *West*, 505 U. S. 277, 307 (1992) (Ken-

nedy, J., concurring in the judgment). In the same way, the proper scope of the new statutory rule is determined in part by its nature.

The place to begin, as Senator Biden noted in the debate, is at the top. See 141 Cong. Rec. S7842 (daily ed. June 7, 1995). "An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court *shall not be granted* with respect to any claim *adjudicated on the merits* in State court proceedings *unless* . . . ." 28 U. S. C. § 2254(d) (emphasis added).

This states the general rule. What follows the "unless" are exceptions to the general rule. This rule is a prohibition against granting relief to a party who has already litigated and lost the same claim. This is a rule of prior adjudication. It falls into the same family of rules as the doctrines of res judicata, law of the case, successive petitions, and *Stone* v. *Powell*, 428 U. S. 465 (1976). "The general principle in this language in the Hatch bill is that Federal courts shall not grant a claim that was adjudicated in State court proceedings. That is what is at the top." 141 Cong. Rec. S7842 (daily ed. June, 7, 1995) (statement of Sen. Biden); Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 946 (1998).[2]

The attempts to pound the square peg of § 2254(d) into the round hole of retroactivity typically focus on the exceptions and ignore the rule. For example, Liebman & Ryan, "Some Effectual Power": The Quantity and Quality of Decision-making Required of Article III Courts, 98 Colum. L. Rev. 696, 866-868 (1998) quote the main body of subsection (d) along with paragraph (1), but then never mention the general rule in their statutory analysis. See also Brief for Petitioner 26-39 (same); Brief for the American Civil Liberties Union as *Amicus Curiae* 4-13 (same) ("ACLU Brief"). These arguments are

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2. This article is cited throughout this brief out of necessity, not hubris. To stay within the page limit, the discussion is thin in spots, referring to the article for a more complete discussion.

mistaken on their own terms. More fundamentally, though, it would be exceedingly odd for Congress to have expressed the basic nature of the rule in the exceptions rather than the main rule.

If Congress were going to codify or modify *Teague* and enact a rule of retroactivity, one would expect the topics of retroactivity, time, and choice of governing law to be placed front and center, *i.e.*, something like this:

> "(a) RETROACTIVE APPLICATION OF NEW RULES—
>
> . . . . .
>
> " 'Sec. 2257. Law applicable
>
> " 'In cases subject to this chapter, all claims shall be governed by the law as it was when the petitioner's conviction became final. A court considering a claim under this chapter shall consider intervening decisions by the Supreme Court of the United States which establish fundamental constitutional rights.'." S. 1657, 103d Cong., 1st Sess. § 304(a) (1993).

One would further expect that when such a bill reached the floor, the *Teague* decision and other retroactivity cases would be prominent in the debate. That is what happened in the debate on S. 1657, *supra*, which really was a retroactivity provision. See 139 Cong. Rec. 29,444-29,449 (1993). That is not what happened in the debate over S. 735. *Teague* was not even mentioned on the floor. The same Senators (Hatch, Biden, and Specter) who debated *Teague* and retroactivity in considering S. 1657 debated the present measure at length without mentioning *Teague*. 141 Cong. Rec. S7831-S7849 (daily ed. June 7, 1995). The best the other side can point to is a few ambiguous impromptu responses by witnesses to a question in a committee hearing. See ACLU Brief 27, n. 47. A weaker example of legislative history is difficult to imagine.

The word actually used on the floor was not "retroactivity," but "deference." "As one commentator accurately recounts, in

both houses of Congress section 2254(d) 'was called a "deference" standard by every member who spoke on the question, opponents as well as supporters.' " *Matteo* v. *Superintendent*, 171 F. 3d 877, 890 (CA3 1999) (en banc). The word "deference" is important, because that is the kind of rule that the concurring Justices in *West* emphatically declared that *Teague* was not. *Wright* v. *West*, *supra*, 505 U. S., at 304 (O'Connor, J., concurring in the judgment); *id.*, at 307 (Kennedy, J., concurring in the judgment). Both the supporters and opponents understood that this bill took the step that the Court considered, but did not take, in *West*. In light of the case law under the prior statute, and Congress's arguable ratification of it in 1966, see *id.*, at 294-295 (plurality opinion), the step was properly one for Congress rather than the Court to take. See *id.*, at 305-306 (O'Connor, J., concurring in the judgment); see also *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172-173 (1989) (statutory interpretation precedents have special weight as *stare decisis*, precisely *because* Congress can abrogate them); Scheidegger, *supra*, 98 Colum. L. Rev., at 888-889.

The language of subsection (d) closely tracks the language of subsection (b), the exhaustion rule. That is because they are similar rules. Subsection (a) states the exclusive ground for granting federal habeas relief to a state convict: "that he is in custody in violation of the Constitution or laws or treaties of the United States." Subsections (b) and (d) state reasons for not reaching the underlying claim, based on what did or did not happen in state court. Section (b) forbids relief if the prisoner has *not* fairly presented his claims to state courts, with certain exceptions. See *Castille* v. *Peoples*, 489 U. S. 346, 351 (1989). Subsection (d) forbids relief if the state courts *have* decided the claims against the prisoner, with certain exceptions.

In both subsections, the exceptions deal with gross deficiencies in the state process. If state process is absent or ineffective, it need not be exhausted. 28 U. S. C. § 2254(b)(1)(B). If a state court fails to apply a clearly established Supreme Court precedent or applies it unreasonably, its judgment does not bar

relief. § 2254(d)(1); *Neelley* v. *Nagle*, 138 F. 3d 917, 924 (CA11 1998). But if the state provides effective process, the state court recognizes the correct rule of law, and the state court reasonably applies the rule to the facts, then that decision stands, subject only to review by higher state courts and by this Court on certiorari. This rule is the natural result of principles recognized by this Court. "Direct review is the principal avenue for challenging a conviction . . . . 'The role of federal habeas proceedings, while important . . . , is secondary and limited.' " *Brecht* v. *Abrahamson*, 507 U. S. 619, 633 (1993) (quoting *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983)).

> "We may mystify any thing. But if we take a plain view of the words of the [statute], and give to them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation." *Ex parte Siebold*, 100 U. S. 371, 393 (1880).

The nature of this rule is plain and found on the surface. It forbids granting a claim previously rejected by a coordinate court, unless an exception applies. It is a rule of prior adjudication, not a rule of retroactivity or choice of law.

B. Tradition—Generally.

Far from being a radical innovation, the new rule brings federal habeas for state prisoners back toward the mainstream of Anglo-American jurisprudence. The procedure is still unique, but it is less anomalous than it was before.

The traditional general rule is res judicata. State court judgments have res judicata effect in federal court. That has been the rule, if not from day one, at least from year two. The first Congress, in its second session, enacted the Full Faith and Credit Act. See *Baker* v. *General Motors Corp.*, 522 U. S. 222, 232, n. 4 (1998); Act of May 26, 1790, ch. 11, 1 Stat. 122; 28 U. S. C. § 1738; Scheidegger, *supra*, 98 Colum. L. Rev., at 912.

This statute applies to federal courts as much as state courts. *Mills* v. *Duryee*, 7 Cranch (11 U. S.) 481, 485 (1813). It applies to federal questions as well as state-law questions, and it does not permit reexamination of the merits. "That the adjudication of federal questions by the [state court] may have been erroneous is immaterial for purposes of *res judicata*." *Angel* v. *Bullington*, 330 U. S. 183, 187 (1947); see also *Allen* v. *McCurry*, 449 U. S. 90, 103 (1980) (no right to relitigate in federal court).

In cases where res judicata does not apply, relitigation of an issue may be barred by the "law of the case" doctrine. "Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation." *Agostini* v. *Felton*, 521 U. S. 203, 236 (1997). This "doctrine applies as much to the decisions of a coordinate court in the same case as to a court's own decisions." *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800, 816 (1988); Scheidegger, *supra*, 98 Colum. L. Rev., at 914, and n. 158.

The doctrine is more flexible than res judicata, however, *Arizona* v. *California*, 460 U. S. 605, 618 (1983), and it does not stop a court from reconsidering an issue if the prior decision "is *clearly* erroneous and would work a manifest injustice." *Id.*, at 618, n. 8 (emphasis added); *Agostini*, *supra*, 521 U. S., at 236. The term "clearly" is important here. Upon finding the decision of the first court to be *plausible*, the inquiry of the coordinate court ends. *Christianson*, *supra*, 486 U. S., at 819.

Unlike res judicata, law of the case depends on the relative status of the courts in question. A higher court hearing an appeal is not bound by a decision of a lower court. See *id.*, at 817. Conversely, a lower court is not entitled to declare the higher court decision clearly erroneous and disregard it. See *Vendo Co.* v. *Lektro-Vend Corp.*, 434 U. S. 425, 427-428 (1978).

On one point, *amicus* ACLU is exactly right: "Inferior federal courts and state courts are co-equals; both answer only

to this Court." ACLU Brief 4; see also Scheidegger, *supra*, 98 Colum. L. Rev., at 898-899. The problem is that since *Brown* v. *Allen*, *supra*, 344 U. S. 443 (1953), they have not been treated as co-equals. Congress has acted to correct that anomaly, based squarely on the premise that "[s]tate courts, in many respects, are just as good, if not better, than the Federal courts—in these areas, just as good." 141 Cong. Rec. S7846 (daily ed. June 7, 1995) (statement of Sen. Hatch).

Congress did not exactly adopt the coordinate-court law-of-the-case doctrine in § 2254(d). It crafted a new rule. Yet the rule is closely analogous to law of the case, and it proceeds on a similar premise. In essence, Congress has told the federal district and circuit courts to stop treating the state courts as lower courts and start treating them as coordinate courts.

C. Tradition—Habeas.

Courts and commentators sometimes blithely assert that res judicata has never applied in habeas corpus. See, *e.g.*, *Fay* v. *Noia*, 372 U. S. 391, 423 (1963), overruled on other grounds, *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991). At common law, that was true of the output of habeas but not the inputs. That is, a prior denial in habeas did not preclude a successive petition. See *McCleskey* v. *Zant*, 499 U. S. 467, 479 (1991). It is not true, though, that the habeas court was free to ignore the res judicata effect of other judgments, especially a judgment of conviction. *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203, 209 (1830) holds unambiguously to the contrary. See Scheidegger, *supra*, 98 Colum. L. Rev., at 928-932 (discussing *Watkins*).

The subsequent history has been discussed many times and need not be repeated here. Suffice it to say that before *Brown* v. *Allen*, *supra*, this Court had developed two discretionary rules of prior adjudication. First, contrary to the common law rule, a judge presented with a successive petition could, but need not, consider the prior denial, even to the point of giving it controlling weight. *Salinger* v. *Loisel*, 265 U. S. 224, 231 (1924); see *McCleskey*, *supra*, 499 U. S., at 481-482.

Second, *Darr* v. *Burford*, 339 U. S. 200, 214 (1950), overruled on other grounds, *Fay* v. *Noia*, *supra*, 372 U. S., at 435-436, acknowledged that the adjudication on direct review would not be res judicata. However, *Darr* held unequivocally that following state review and denial of certiorari, the habeas court "*may* decline to examine further into the merits *because they have already been decided against the petitioner*. [Footnote citing *Salinger*.] Thus there is *avoided* . . . repeated adjudications of the same issues *by courts of coordinate powers*." *Id.*, at 215 (emphasis added).

Words can hardly be more clear. *Darr* was a rule of prior adjudication, albeit a flexible, discretionary one. The persistent myth that denial of habeas relitigation in this era was based on a substantive theory of due process rather than a rule of prior adjudication, see, *e.g.*, Peller, In Defense of Federal Habeas Corpus Relitigation, 16 Harv. C.R.-C.L. L. Rev. 579, 663 (1982), is just that—a myth.

The *Salinger* rule of successive petitions evolved from one of amorphous discretion to the very lax rule of *Sanders* v. *United States*, 373 U. S. 1, 17-18 (1963), to the more structured rule of *McCleskey*, *supra*, 499 U. S., at 493, and finally into the codified rule of 28 U. S. C. § 2244(b). The effect of the prior state adjudication of the claim has followed a similar, though not parallel, evolution. *Brown*, *supra*, effectively reduced the state decision to a mere precedent from another jurisdiction, albeit a particularly pertinent one. See *Wright* v. *West*, 505 U. S. 277, 305 (1992) (O'Connor, J., concurring in the judgment). In § 2254(d), Congress has done with *Darr* just what *McCleskey* and § 2244(b) did with *Salinger*; it has restored the spirit of the pre-1953 discretionary rule but replaced it with a structured and more tightly limited rule.

Throughout American history, the availability of federal habeas for state prisoners has varied as a function of confidence in state courts relative to federal courts. It was forbidden in the beginning, when federal courts were a feared innovation. See Scheidegger, *supra*, 98 Colum. L. Rev., at 932. It was expan-

sive during Reconstruction, see Forsythe, The Historical Origins of Broad Federal Habeas Review Reconsidered, 70 Notre Dame L. Rev. 1079, 1117-1118 (1995), retracted in the late nineteenth century, see, *e.g.*, *In re Wood*, 140 U. S. 278, 285-286 (1891), expanded again in the 1950s and 1960s during the civil rights struggle, see *Brown*, *supra*; *Fay* v. *Noia*, *supra*, and retracted again in the last quarter of this century in *Stone* v. *Powell*, 428 U. S. 465 (1976), *Teague*, *supra*, *Coleman*, *supra*, and other cases.

The enactment of a qualified prior adjudication bar is the next logical step in this evolution. It takes us back to the principle that relitigation is the exception and finality of judgments is the rule. See *Ex parte Hawk*, 321 U. S. 114, 118 (1944) (*per curiam*) ("not ordinarily re-examine"). It does so based on the recognition that state courts today are far different from what they were in 1953 or 1963, that they warrant more confidence, and that their judgments deserve more respect.

D. Teague Survives.

There were some comments after AEDPA that the rule of *Teague* had been supplanted. See, *e.g.*, Liebman & Ryan, *supra*, 98 Colum. L. Rev., at 866. This is wishful thinking by the rule's intractable opponents. See Scheidegger, *supra*, 98 Colum. L. Rev., at 959, n. 500.

Breard v. *Greene*, 523 U. S. 371, 377 (1998) (*per curiam*) sets that claim to rest. *Teague* remains as an independent limitation on the scope of habeas relief. Where the state court has ruled on the merits, *Teague* will overlap with § 2254(d)(1). There are, however, a number of situations when *Teague* will continue to have independent force.

In *Breard*, petitioner claimed novelty as cause for his default. *Ibid.*; cf. *Reed* v. *Ross*, 468 U. S. 1, 14-15 (1984). *Teague* effectively shuts down this route, unless one of its exceedingly narrow exceptions applies. *Teague* also has independent force when the federal court has decided, rightly or

wrongly, that a state's procedural default rule is not adequate and independent. Claims defaulted on appeal in the nation's largest state are presently in this status. See *Morales* v. *Calderon*, 85 F. 3d 1387, 1393 (CA9 1996), cert. denied *sub nom. Calderon* v. *Morales*, 519 U. S. 1001 (1996). The class of claims to which *Teague* applies but § 2254(d)(1) does not remains significant.

Congress could not possibly have intended to withdraw *Teague*'s protection from this entire class of claims. That would be contrary to the entire thrust and purpose of the bill. The judicially created limitation of retroactivity and the legislatively created limitation of prior adjudication stand as independent grounds for decision. In many cases both apply, but each reaches claims that the other does not.

II. The Courts of Appeals have unanimously rejected the thesis that review of mixed questions is unchanged.

When the AEDPA passed Congress, the legislative counsel for *amicus* ACLU acknowledged what all involved understood at the time: that the bill had fundamentally changed habeas corpus, and that federal courts would no longer be able to overturn state court decisions for mere disagreement. Thompson, Congress OKs Broad Reform of "Great Writ," L. A. Daily Journal, Apr. 19, 1996, p. 8, col. 2. *Amicus* CJLF agreed with the ACLU's assessment of the magnitude of the change, though disagreeing on its desirability. *Ibid.*

Now petitioner, with the support of the ACLU and others, would have this Court believe that the long, bitter debate over this Act was much ado about not very much, that supporters and opponents were both mistaken, and that the Act does little more than tinker at the edges of *Teague* v. *Lane*, 489 U. S. 288 (1989). See Brief for Petitioner 32-33; ACLU Brief 2; Liebman & Ryan, *supra*, 98 Colum. L. Rev., at 867-873.

The most important area of dispute involves the "mixed question" situation, where the applicable rule is clearly estab-

lished but general in its terms, and the dispute involves the application of that rule to specific facts. Petitioner claims that the AEDPA left this area unchanged, and he claims five circuits in support. Brief for Petitioner 39, n. 20. Actually, this thesis has been unanimously rejected by the circuits which have considered it.

As petitioner acknowledges, the Fourth, Fifth, Seventh, and Eleventh Circuits are contrary to his position. See Brief for Petitioner 40; *Drinkard* v. *Johnson*, 97 F. 3d 751, 767-768 (CA5 1996) ("unreasonable application" clause applies to mixed questions of law and fact); *Lindh* v. *Murphy*, 96 F. 3d 856, 870 (CA7 1996), rev'd on other grounds, 521 U. S. 320 (1997) (same); *Neelley* v. *Nagle*, 138 F. 3d 917, 924 (CA11 1998) (following *Drinkard*); *Green* v. *French*, 143 F. 3d 865, 870 (CA4 1998) (largely the same, with different analysis for factually indistinguishable cases).

Other circuits have taken different analytical approaches. However, when we look carefully at how those approaches are applied to decide actual cases, we see that the differences are more apparent than real. Most importantly, all the circuits with a defined position agree that when the state court applies the correct general rule to specific facts, its decision stands if it is reasonable, and mere disagreement is insufficient for collateral attack.

Petitioner relies on *Ayala* v. *Speckard*, 89 F. 3d 91 (CA2 1996) for the Second Circuit's position in favor of "plenary" relitigation of such claims. However, the Second Circuit subsequently granted rehearing en banc. The en banc court rendered its decision after *Lindh* v. *Murphy*, 521 U. S. 320 (1997), and hence did not need to discuss the AEDPA. See *Ayala* v. *Speckard*, 131 F. 3d 62 (CA2 1997). The panel decision in *Ayala* therefore has no value as precedent, and the Second Circuit has not since taken a definite stand. See *Smalls* v. *Batista*, No. 98-2526, text accompanying n. 5 (CA2 July 30, 1999) (noting but not taking position in circuit split).

The first court of appeals case to expressly disagree with *Drinkard* and *Lindh* was the First Circuit opinion in *O'Brien* v. *Dubois*, 145 F. 3d 16 (CA1 1998). *O'Brien* held that "the habeas court asks whether the Supreme Court has prescribed a rule that governs the petitioner's claim." *Id.*, at 24. If so, the court proceeds with the "contrary to" prong and otherwise goes to the "unreasonable application" prong. *Ibid.*

Despite its superficial similarity to the Liebman approach, in actual application the First Circuit is closer to *Drinkard* and *Lindh*. Its "contrary to" analysis is limited to *specific* rules, *id.*, at 25, and if "no Supreme Court precedent is dispositive of a petitioner's claim," *ibid.*, the First Circuit proceeds to "unreasonable application." "This reduces to a question of whether the state court's derivation of a case-specific rule from the [Supreme] Court's generally relevant jurisprudence appears objectively reasonable." *Ibid.*

Applying the standard to O'Brien's Confrontation Clause claim of restricted recross-examination, the court found the general rule of effective cross-examination insufficiently specific for the "contrary to" branch. The state court's resolution was plausible, and that was sufficient to deny relief under § 2254(d)(1). *Id.*, at 27.

Bui v. *DiPaolo*, 170 F. 3d 232 (CA1 1999) eliminates any doubt that the First Circuit does not support petitioner's thesis. On Bui's Confrontation Clause claim, the state and federal courts agreed that the relevant legal principles reduced the question to whether Bui had made a sufficient foundational showing of witness bias to entitle him to cross-examination on the point. The question of whether evidence is sufficient to meet a particular legal standard is the quintessential "mixed question," the kind involved in *Wright* v. *West*, 505 U. S. 277 (1992). *Bui* examined the state court's determination for reasonableness. 170 F. 3d, at 244. The court expressly rejected the notion that the AEDPA standard was "one of plenary review," holding that such a transformation of the standard would amount to defiance of Congress's will. *Id.*, at 243.

"When, as now, a petitioner can show only that *rational minds might differ* over how to apply certain *general* constitutional principles *to the specific circumstances* of his case, the current habeas corpus standard of review does not allow a federal court to invalidate a state conviction." *Id.*, at 246 (emphasis added). The First Circuit has thus fully rejected the notion that review of mixed questions remains "plenary."

Most recently, the First Circuit applied its *O'Brien* approach to an ineffective assistance claim in *Vieux* v. *Pepe*, No. 98-1864 (CA1 July 19, 1999). The court held that "the petitioner may succeed under the 'contrary to' clause only if Supreme Court caselaw directly governs the claim and the state court got it wrong." *Id.*, part III, para. 6. The federal court noted that the state court "conducted a proper *Strickland* analysis." *Id.*, part IV, para. 2. That is, it correctly recognized the governing rule. See *ibid.* In this case, unlike the typical *Strickland* case, the assessment of the attorney's performance involved a question of "pure" law regarding the federal wiretapping statute. With no Supreme Court precedent on the latter point, *Vieux* evaluated the state decision under "unreasonable application." *Id.*, part IV, paras. 9-10. In a footnote, the court reiterates that nearly all *Strickland* claims will pass the "contrary to" stage. *Id.*, n. 2. Hence, the main question in such cases will be the "unreasonable application" analysis.

The circuit position generally most favorable to habeas petitioners is that of the Third Circuit in *Matteo* v. *Superintendent*, 171 F. 3d 877 (CA3 1999) (en banc). Yet even the Third Circuit is closer to the state's interpretation than it is to the petitioner's.

Matteo largely follows *O'Brien*, *supra*. It asks, under the "contrary to" prong, whether "applicable Supreme Court precedent . . . *resolves* the petitioner's claim." *Id.*, at 888 (emphasis added). Still following the First Circuit, *Matteo* rejects the idea that " 'a general standard that covers the claim' " is sufficient for "contrary to" review. *Ibid.* (quoting *O'Brien*, 145 F. 3d, at 24). *West*-type claims, applying general

standards to specific facts, are thus excluded from "contrary to" review and move over to "unreasonable application."

The court quotes Senator Specter in the floor debate saying, " 'Unless it is unreasonable, a State court's decision applying the law *to the facts* will be upheld.' " *Id.*, at 890 (emphasis added); see 142 Cong. Rec. 7799 (1996). *Matteo* also specifically rejects the notion that "contrary to" review is "plenary" as petitioner uses that term. "This standard precludes granting habeas relief solely on the basis of simple disagreement with a reasonable state court interpretation . . . ." *Matteo*, 171 F. 3d, at 888. For claims evaluated under "unreasonable application," which will be most of them, *Matteo* reaffirms that mere disagreement is not enough. "To hold otherwise would resemble de novo review, *which we believe is proscribed by the statute*." *Id.*, at 889 (emphasis added).

For its standard, *Matteo* settles on this: "whether the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified." *Id.*, at 891. *Matteo* says its standard will result in the granting of more petitions than the First Circuit's "outside the universe of plausible, credible outcomes." *Id.*, at 889. *Amicus* believes that the reality is similar to the situation which existed in ineffective assistance cases before *Strickland* v. *Washington*, 466 U. S. 668, 696-697 (1984), when the differing formulations of the performance standard rarely changed the outcome of the case.

The *Matteo* court's approach to the issue in the case illustrates the extent of the change wrought by the AEDPA. Matteo's claim involved a phone call he made from jail, which was taped by police with the consent of the other party, Lubking. 171 F. 3d, at 882-884. The elements of Matteo's Sixth Amendment claim were established in Supreme Court precedent: "(1) the right to counsel must have attached at the time of the alleged infringement; (2) the informant must have been acting as a 'government agent'; and (3) the informant must have engaged in 'deliberate elicitation' of incriminating information from the defendant." *Id.*, at 892 (citing *Maine* v. *Moulton*, 474

U. S. 159, 170-171 (1985) and *United States* v. *Henry*, 447 U. S. 264, 269-270 (1980)); see also *Kuhlmann* v. *Wilson*, 477 U. S. 436, 459 (1986).

If the Third Circuit followed petitioner's view of the statute, it would have conducted "plenary 'contrary to' review," because "Supreme Court law had specifically designed a rule for the claim when the state court acted . . . ." Brief for Petitioner 38. There is no "absence of prescribed law" here, cf. *id.*, at 39, and hence, according to petitioner, no basis for "unreasonable application" review.

The *Matteo* court did just the opposite. It declared that the rule quoted above was not specific enough "to merit 'contrary to' review" and proceeded to "unreasonable application." 171 F. 3d, at 893. Yet the rule in question is surely no less specific than the rules in the pre-AEDPA "mixed question" cases where *de novo* review was applied. See *Strickland*, *supra*, 466 U. S., at 698 (ineffective assistance of counsel); *Wright* v. *West*, *supra*, 505 U. S., at 295 (lead opinion) (sufficiency of the evidence; *de novo* standard assumed and applied); *Thompson* v. *Keohane*, 516 U. S. 99, 102 (1995) (*Miranda*, question of when suspect is in "custody"). Indeed, the issue before the court in *Matteo* was governed by a rule *more* specific than the rules in *Strickland* and *West*, and comparable to the one in *Thompson*. If specificity is the criterion for choosing between "contrary to" and "unreasonable application," as the First and Third Circuits hold, and if the rule at issue in *Matteo* falls on the nonspecific side of the line, then all of the recent *de novo*/mixed question cases would also fall on that side.

Petitioner cites *Canales* v. *Roe*, 151 F. 3d 1226, 1229, n. 2 (CA9 1998) for the proposition that the Ninth Circuit requires plenary review of *Strickland* claims. Brief for Petitioner 39, n. 20. That decision merely states that the *Strickland* test is

"clearly established," a proposition never in dispute.[3] A far better example of the Ninth Circuit position on this issue is *Furman* v. *Wood*, 169 F. 3d 1230 (CA9 1999). *Furman* reaffirmed the Ninth Circuit's acceptance of the *Drinkard/Lindh* analysis, *i.e.*, that mixed questions are governed by the "unreasonable application" prong. *Id.*, at 1232. Applying the statute to the state court's decision on the *Strickland* claim, *Furman* reviewed the state court's holdings on both performance and prejudice and found them reasonable. *Id.*, at 1235. That is sufficient to bar relief under the statute. *Ibid.*

In the Tenth Circuit, petitioner relies on *Miller* v. *Champion*, 161 F. 3d 1249, 1253 (CA10 1998). Brief for Petitioner 39, n. 20. *Miller* is a curious opinion. It quotes the new standard, 161 F. 3d, at 1253, but never applies it. For the proposition that ineffective assistance claims are mixed questions and hence reviewed *de novo*, *Miller* simply cites *Parker* v. *Champion*, 148 F. 3d 1219, 1221 (CA10 1998), which does not mention the AEDPA at all. 161 F. 3d, at 1254. There is no discussion of § 2254(d)(1) in either *Parker* or *Miller* and no attempt to distinguish or criticize decisions from other circuits holding that the statute had changed the rule. The actual holding of *Miller* was that the petitioner had tried to develop the facts in state court, was denied the opportunity to do so, and hence was entitled to an evidentiary hearing in federal court. *Id.*, at 1253, 1259. Given that circumstance, § 2254(d)(1) is only tangential to the case, so the lack of discussion may be understandable.

Other Tenth Circuit cases before and since *Miller* have addressed the statute, and they paint a different picture. *Houchin* v. *Zavaras*, 107 F. 3d 1465, 1470 (CA10 1997)

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3. The actual holding of *Canales* is that petitioner's claim, a variation on the claim presently before this Court in *Roe* v. *Ortega*, No. 98-1441, was *not* clearly established. 151 F. 3d, at 1231. Hence there was no need to go into a detailed examination of how to apply the statute to a straight *Strickland* claim.

declared that the "AEDPA increases the deference to be paid by the federal courts to the state court's factual findings and legal determinations." *LaFevers* v. *Gibson*, No. 98-6302 (CA10 June 16, 1999) interprets § 2254(d)(1) as allowing an exception to claim preclusion only "if: (1) the state court decision is in square conflict with Supreme Court precedent which is controlling on law and fact or (2) if its decision rests upon an objectively unreasonable application of Supreme Court precedent *to new facts*." *Id.*, part III, para. 2 (emphasis added). Manifestly, *Wright* v. *West*-type cases applying established standards to case-specific facts would fall under the second prong.

The Sixth Circuit has declined to take sides while noting, consistently with the position in this brief, that there is less to the circuit split than meets the eye. In *Nevers* v. *Killinger*, 169 F. 3d 352, 357-362 (CA6 1999), the court reviewed the positions of the other circuits. *Nevers* then held that fact-intensive, case-specific applications of established rules fall under "unreasonable application" under either approach. *Id.*, at 360-361.

Finally, in *Long* v. *Humphrey*, No. 98-3409 (CA8 July 14, 1999), the Eighth Circuit took an approach similar to *Nevers*. The "manifest necessity" standard for ordering a mistrial over the defendant's objection is a fact-intense, case-specific mixed question, and it falls under the "unreasonable application" prong under either *Drinkard* or *O'Brien*. *Id.*, para 7.

In summary, then, ten of the eleven numbered circuits have ruled on the question of how to evaluate, under § 2254(d), claims involving clearly established but general rules as applied to case-specific facts, when no Supreme Court case is factually indistinguishable. The circuits have unanimously concluded that such cases fall under the "unreasonable application" prong.

III. "Contrary to" governs rule selection, "unreasonable application" governs rule application, and "clearly established" qualifies both.

In *Neelley* v. *Nagle*, 138 F. 3d 917, 924-925 (CA11 1998), the Eleventh Circuit summarized the framework for applying 28 U. S. C. § 2254(d)(1) this way:

> "Thus, as we read the statute, a court evaluating a habeas petition under § 2254(d)(1) must engage in a three-step process: First, the court must 'survey the legal landscape,' using an inquiry similar to that under *Teague*, to ascertain the federal law applicable to the petitioner's claim that is 'clearly established' by the Supreme Court at the time of the state court's adjudication. Second, the court must determine whether the state court adjudication was contrary to the clearly established Supreme Court case law, either because the state court failed to apply the proper Supreme Court precedent, or because the state court reached a different conclusion on substantially similar facts. If the state court's decision is not contrary to law, the reviewing court must then determine whether the state court unreasonably applied the relevant Supreme Court authority. The state court decision must stand unless it is not debatable among reasonable jurists that the result of which the petitioner complains is incorrect."

This statement of the rule is consistent with the language, history, and intent of the statute, and it provides a straightforward framework for analyzing habeas claims under the statute. With a few qualifications and explanations, *amicus* submits it should be adopted.

Section 2254(d)(1) contains two branches which share a common trunk. The trunk is the requirement that the rule in question be "clearly established" by Supreme Court case law. The term "clearly established" appears in *Teague* case law in *Sawyer* v. *Smith*, 497 U. S. 227 (1990), which borrows it from

the qualified immunity cases. *Id.*, at 236 (quoting *Anderson* v. *Creighton*, 483 U. S. 635, 639 (1987)).

Although the new statute is not a rule of retroactivity, it does share this element with the *Teague* line. "Clearly established" requires a certain degree of specificity of the rule of law to be applied. The principle of reliability in capital sentencing, for example, is not specific enough to be an established rule. See *ibid.*

If the determination of whether there is a clearly established Supreme Court precedent governing the case is a *Teague*-like inquiry, as the borrowing of the term from *Sawyer* strongly implies, then it makes sense that this determination involves the same step of the decision-making process as *Teague*. There are "three distinct functions" in this process: "law declaration, fact identification, and law application." See Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 234 (1985). *Teague*, being a doctrine of retroactivity, necessarily addresses rules, *i.e.*, law declaration rather than law application. See *Wright* v. *West*, 505 U. S. 277, 307 (1992) (Kennedy, J., concurring in the judgment).

While "contrary to law" review in some contexts encompasses both law declaration and law application, see Brief for Petitioner 34, n. 17, in this case Congress has created a separate clause for application. *Amicus* ACLU claims support from the fact that the Senate's modification of the House language lacks the prepositional phrase "to the facts" after the word "application." ACLU Brief 29. This, they would have the Court believe, worked a complete transformation of the subject matter of the second branch, changing the subject from application of law to fact into an unrelated inquiry about deriving new rules from existing ones. See also Liebman & Ryan, *supra*, 98 Colum. L. Rev., at 871-872.

There are several answers to this contention. First, the attachment of the prepositional phrase "to the facts" is not essential to the meaning of "application" in this context. Justice

Kennedy's opinion in *Wright* v. *West*, *supra*, 505 U. S., at 308, refers to "specific applications" without adding "to the facts." Professor Monaghan's influential article, see *supra*, at 20, likewise refers to "law application" without appending "to the facts." Indeed, Professor Monaghan himself interpreted this language as applying to mixed questions, and Senator Cohen read his letter to that effect on the floor of the Senate. 141 Cong. Rec. S7839 (daily ed. June 7, 1995).

Second, none of the people involved in the transformation from the House to the Senate version saw the deletion of "to the facts" as transforming "application" from mixed questions to something else. The language emerged from "very extended negotiations" between Senator Specter and Senator Hatch, *id.*, at S7803, both of whom confirmed that the bill applied a reasonableness standard to the state court's application of the law to the facts. 142 Cong. Rec. 7772-7773 (1996) (statement of Sen. Hatch); *id.*, at 7799 (statement of Sen. Specter). While "application" can have a different meaning, the people who made the change from the House to the Senate version did not intend one.

Third, a rule that lower federal courts could overturn state decisions on mere disagreement with their application of established law, while the zone of disagreement on law declaration is protected from such interference, would be incompatible with the basic nature of § 2254(d) as a rule of prior adjudication. The underlying premise is that one bite at the apple, with review up the appellate chain, is normally all a litigant gets, with exceptions to prevent injustice when the normal mechanism seriously malfunctions.

This premise is consistent with this Court's "long history of distinguishing between collateral and direct review [citation] and confining collateral relief to cases that involve *fundamental* defects or omissions inconsistent with the *rudimentary*, demands of fair procedure [citations]." *Brecht* v. *Abrahamson*, 507 U. S. 619, 640 (1993) (Stevens, J., concurring) (emphasis added). This was precisely Senator Hatch's point. "After all,

Federal habeas review exists to correct fundamental defects in the law. After the State court has reasonably applied Federal law, it is hard to say that a fundamental defect exists." 142 Cong. Rec. 7772 (1996). Collateral attack on a final judgment is a drastic remedy, reserved for egregious errors. Simple disagreement on close questions regarding the application of settled law to varying facts does not rise to that level.

Unlike retroactivity, nothing in the principle of respect for prior adjudications by coordinate courts excludes that principle from the law application portion of the decision. "The comity interest [in *Teague*] is not, however, in saying that since the question is close the state-court decision ought to be deemed correct because [the lower federal courts][4] are in no better position to judge. That would be the real thrust of a principle based on deference." *Wright* v. *West*, *supra*, 505 U. S., at 308 (Kennedy, J., concurring in the judgment). That is indeed the real thrust of § 2254(d). See *supra*, at 4, 8.

The First Circuit in *O'Brien* v. *Dubois*, 145 F. 3d 16, 22 (CA1 1998), objected that reading this branch to refer to mixed questions was "embroidery of the statute's text." In reality, it is right there in the word "application." Furthermore, this interpretation does not scavenge language discarded by the Senate from the House version, because the Senate kept the key operative word, "application," discarding only a prepositional phrase the negotiators evidently considered surplusage.

As the Third Circuit noted, the Fourth Circuit's "catalogue" of various situations warranting "contrary to" or "unreasonable application" treatment would be difficult to apply in practice. *Matteo* v. *Superintendent*, 171 F. 3d 877, 888 (CA3 1999) (en banc). Yet the First/Third Circuit approach has a similar difficulty. The line between rules specific enough for "contrary

---

4. The opinion actually says "we" here, but this Court's plenary review authority on certiorari to state courts remains unimpaired. This statute is about the relative roles of the state and lower federal courts.

to" treatment versus those that warrant "unreasonable application" is not well defined. See *supra*, at 13-16.

Amicus CJLF submits that the simple approach is the best one. "Contrary to" applies to law declaration, as Professor Monaghan called it, or "pristine legal standard[s]," in the words of *Miller* v. *Fenton*, 474 U. S. 104, 114 (1985). "Unreasonable application" applies to "law application," also known as "mixed questions of law and fact." Identifying the rule of law and then applying the law to the facts is a familiar two-step process, which all members of the profession have been doing since law school. Analyzing habeas claims in this way will present the fewest difficulties.

Some decisions have indicated that this bifurcation approach applies a radically different level of scrutiny to the two aspects of the state decision. See *Matteo*, 171 F. 3d, at 887. Properly applied, it does not. "Contrary to" must be read in conjunction with the "clearly established" requirement. Because this is a *Teague*-like inquiry, it incorporates the principle of *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990) that susceptibility to debate among reasonable minds is enough to render a rule "new" for *Teague* and not "clearly established" for § 2254(d)(1). Thus, the basic test of reasonableness applies to both branches of § 2254(d)(1).

"Contrary to" review is not *de novo* review of the underlying claim. The federal court does exercise independent judgment, but it exercises that judgment on whether the prerequisite for an exception to the prior adjudication bar has been met, *i.e.*, whether the state court decision is contrary to clearly established Supreme Court precedent. See Scheidegger, *supra*, 98 Colum. L. Rev., at 959.

In making this determination, the precedents of the federal circuits are not irrelevant, cf. *Furman* v. *Wood*, 169 F. 3d 1230, 1232 (CA9 1999), but neither is the circuit's own precedent controlling, or even particularly weighty. Instead, as under *Teague* when properly applied, a survey of the entire legal

landscape is called for; state as well as federal precedents must be considered. *Caspari* v. *Bohlen*, 510 U. S. 383, 395 (1994).[5] The mere existence of conflicting precedent does not *per se* disqualify a rule from "clearly established" status, because some opinions fail to give careful thought to their holdings. However, a substantial split with reasoned opinions on both sides would establish that neither side is "clearly established." See *Vieux* v. *Pepe*, No. 98-1864, n. 4, and accompanying text (CA1 July 19, 1999) (applying similar reasoning, albeit under "unreasonable application" rather than "clearly established"). Conversely, unanimity among numerous reasoned opinions that a Supreme Court precedent does apply to a particular situation could render a perfunctory holding applying a different rule "contrary to . . . clearly established federal law."

Some complaints have been made that virtually no habeas petitions will be granted under such a standard. See, *e.g.*, ACLU Brief 9 ("virtually null set"). On the eve of the twenty-first century, cases that warrant relitigation of claims already addressed *should* be rare. Federal habeas is for "fundamental defects," *Brecht* v. *Abrahamson*, *supra*, 507 U. S., at 640 (Stevens, J., concurring), and our state courts and state corrective mechanisms have evolved to the point that few fundamental defects go uncorrected. Federal habeas is a safety net for situations that should never occur, but do on occasion. Both state and federal courts have been known to fail to apply clearly established Supreme Court precedent. See, *e.g.*, *Pennsylvania* v. *Bruder*, 488 U. S. 9, 11 (1988) (*per curiam*).

Petitioner asks, "What review is required, though, when at the time the state court acted, there was *no* rule for resolving the claim to which its 'decision' could be 'contrary?' " Brief for

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5. There are *Teague* cases in the circuits granting habeas relief based solely on the circuit's own rule as an "old" rule, rather than surveying the entire legal landscape. *Caspari* makes clear these cases are wrongly decided, see Scheidegger, *supra*, 98 Colum L. Rev., at 948, and n. 433, and Congress has simply confirmed that.

Petitioner 36-37. He follows this question with language from *Lambrix* v. *Singletary*, 520 U. S. 518, 529, n. 3 (1997) describing a state of the law in which *Lambrix* held that the rule was new and the claim was *Teague*-barred. *Id.*, at 538. The answer is not "unreasonable application," as petitioner suggests; the answer is "none." In such cases the rule in question is not "clearly established." This trunk is common to both the "contrary to" and "unreasonable application" branches. If there is no clearly established rule to which the state decision could be "contrary," there is also no rule of which it could be an "unreasonable application."

The final question is how to judge "unreasonable application." As noted *supra*, at 15, *amicus* CJLF doubts that the various verbal formulations for the "unreasonable application" branch will really matter in practice. For colorful expression, it would be hard to beat the definition of "clearly erroneous" in *Parts and Elec. Motors, Inc.* v. *Sterling Elec., Inc.*, 866 F. 2d 228, 233 (CA7 1988): "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week old, unrefrigerated dead fish." However, Congress used the word "unreasonable" and the best source for the meaning of that word would seem to be the reasonableness concept in existing habeas case law. That is the standard of *Butler*, *supra*, 494 U. S., at 415, "susceptible to debate among reasonable minds." See also *Saffle* v. *Parks*, 494 U. S. 484, 490 (1990); *O'Dell* v. *Netherland*, 521 U. S. 151, 164 (1997) ("reasonable jurist," post-AEDPA but applying same standard).

In summary, then, the habeas court should proceed in three steps, as the Eleventh Circuit said in *Neelley*. See *supra*, at 19.

1) Conduct a *Teague*-like survey of Supreme Court opinions first, then the rest of the "legal landscape," to determine if the rule petitioner asserts and its applicability to the present case are "clearly established," which is equivalent to "dictated by precedent."

a) No: the paragraph (1) exception to the general rule of preclusion of § 2254(d) is inapplicable. Unless paragraph (2) applies, the claim is barred.

b) Yes: proceed to step 2.

2) Did the state court apply the clearly established rule of law?

a) No: the prior adjudication does not bar the claim. Proceed to the "merits" under pre-AEDPA law, *i.e.*, 28 U. S. C. § 2254(a) as previously construed.

b) Yes: proceed to step 3.

3) Was the state court's application of that rule to the facts of the case reasonable, *i.e.*, within the limits "susceptible to debate among reasonable minds"?

a) Yes: the claim is barred on the ground it has previously been adjudicated, unless § 2254(d)(2) applies.

b) No: the claim is not barred on this ground. Proceed to the merits, if there is anything left to decide.

This straightforward approach, faithfully followed, will substantially advance Congress's goal of speeding up habeas review, by ending the second-guessing of state courts on close questions and reserving collateral relief for cases of fundamental error. See *supra*, at 21-22; see *Brown* v. *Allen*, 344 U. S. 443, 537 (1953) (Jackson, J., concurring in the result) (needles and haystacks). In Appendix A, we reprint the Tenth Circuit's unpublished disposition of an appeal to illustrate the proper application in a typical habeas case, where petitioner is simply judge-shopping his marginal claim past a second set of judges. The federal court reviews the state decision, sees that it applied the correct standard for the claim, and checks that the decision on the facts is a reasonable one. Case dismissed.

IV. There is nothing remotely unconstitutional about a modified rule of res judicata.

This Court denied certiorari on question 4, the claim that the statute, as applied by the Fourth Circuit, is unconstitutional. That claim is not "certworthy," as there is no split of authority. The issue was fully briefed to the Third Circuit in *Matteo* v. *Superintendent*, 171 F. 3d 877 (CA3 1999) (en banc). Yet even though the majority expressly adopted a "deference" standard, *id.*, at 890, not a single judge of the en banc court thought the supposed unconstitutionality of "deference" was even worth discussing.

Despite the denial of certiorari on the point, petitioner raises it on the basis of construing statutes to avoid constitutional questions. The definitive answer is given by *Almendarez-Torres* v. *United States*, 523 U. S. 224, 238 (1998):

> "The doctrine seeks in part to minimize disagreement between the Branches by preserving congressional enactments that might otherwise founder on constitutional objections. It is not designed to aggravate that friction by creating (through the power of precedent) statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate. Thus, those who invoke the doctrine must believe that the alternative is a serious likelihood that the statute will be held unconstitutional. Only then will the doctrine serve its basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made."

Litigants must not be empowered to subvert the democratic process and have courts twist statutes beyond recognition simply by conjuring up specious constitutional hobgoblins. That would be the effect of accepting this argument in this case.

The constitutional argument is made at great length in Liebman & Ryan, *supra*, and refuted in CJLF's response article, Scheidegger, *supra*. If the Court wishes to consider the

constitutional question, we simply refer to the article for a full discussion. There is, however, one point we will include here.

In *Montana* v. *United States*, 440 U. S. 147, 149-151 (1979), the question presented was one of a state tax which, in practice, fell entirely on the federal government. The case thus involved the same issue as the great case of *McCulloch* v. *Maryland*, 4 Wheat. (17 U. S.) 316 (1819). There had been a prior judgment in state court against federal contractors in privity with the government. 440 U. S., at 151.

This Court had jurisdiction, *i.e.*, the power to decide the case, and the Court did decide the case. It decided, however, without reaching the underlying claim. It decided on the ground that the issue had been previously decided. See *id.*, at 164. Thus, a prior judgment of a state court can be the basis of decision in a subsequent suit in federal court, even in the Supreme Court, even on an issue as momentous as *McCulloch*, and even against the United States itself.

If that is so, is there any reason that a prior state decision cannot be the basis for decision in a case such as *Thompson* v. *Keohane*, 516 U. S. 99 (1995)? In that case, the underlying question was whether the conviction of a clearly guilty murderer should be thrown out, not because of any contention his confession was actually involuntary, but only because his un-Mirandized statement was made at a time when he might or might not have been in "custody." See *id.*, at 101-102.

For over two centuries, Congress has directed that, for most cases, state judgments are res judicata in federal courts. See *supra*, at 6. The legitimacy of its authority to do so is beyond question. Why is this statute, extending a rule of prior adjudication to cases like *Thompson*, any different? Is it because Congress chose not to impose full-blown res judicata, but instead required that the state court decision be reasonable? See Liebman & Ryan, *supra*, 98 Colum. L. Rev., at 781-782, and n. 389 (purporting to distinguish Full Faith and Credit Act as "quantitative" versus "qualitative" control). Unless the

Constitution forbids compromise, it does not force Congress to choose between *de novo* relitigation and completely abolishing federal habeas for state prisoners. See Scheidegger, *supra*, 98 Colum. L. Rev., at 892-893, 921, 957-958. The compromise contained in 28 U. S. C. § 2254(d), under any of its interpretations in the courts of appeals, is well within the power of Congress to specify the preclusive effect of state judgments in federal courts.

V. The state court correctly identified and reasonably applied the governing rule.

Under *Strickland* v. *Washington*, 466 U. S. 668, 694 (1984), the general test for the prejudice element of an ineffective assistance claim is whether the "result of the proceeding [has been] rendered unreliable . . . ." For most cases, this is equivalent to a showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Ibid.* The focus is not entirely on the trial jury, however: "When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer—*including an appellate court*, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.*, at 695 (emphasis added). In addition, there are cases holding that the prejudice requirement has not been met even if a different approach would have produced a different result, where that result would have been a malfunction of the system. See *Nix* v. *Whiteside*, 475 U. S. 157, 175 (1986) (perjury); *Lockhart* v. *Fretwell*, 506 U. S. 364, 369 (1993) (argument of law, plausible then but now clearly meritless).

Whether the kind of assessment of the evidence that the Virginia Supreme Court conducted here amounts to the appellate reweighing endorsed by *Strickland* is a question that should be answered in a case that actually turns on it. So, too, is the question of whether a hung penalty jury is a malfunction

of the system within the *Whiteside/Fretwell* rationale. See *Jones* v. *United States*, 527 U. S. __ (No. 97-9361 June 21, 1999) (slip op., at 8) (noting deadlock as jury's inability to fulfill its role, not as a normal operation of the process).

This is not the case, however. At the bottom line, the Virginia Supreme Court decided that petitioner had not met the "straight" *Strickland* requirement. After reviewing the evidence, the court concluded there was " 'no reasonable probability that the omitted evidence would have changed the conclusion . . . .' " *Williams* v. *Warden*, 487 S. E. 2d 194, 200 (Va. 1997) (quoting *Strickland*, 466 U. S., at 700). Whatever alternative holdings or dicta may be in the court's opinion, if this holding passes muster under the statute then habeas relief was properly denied.

Applying the three-step test outlined *supra*, at 25, *Strickland* is clearly established and was applied by the state court. The only question is whether the application was susceptible to debate among reasonable minds. As this Court recently emphasized while discussing an equivalent standard in *Strickler* v. *Greene*, 527 U. S. __, 119 S. Ct. 1936, 1953 (1999), the test is not "reasonable *possibility*" but rather "reasonable *probability*," and the difference matters. Given the height of this hurdle, the decision of the Virginia Supreme Court is not unreasonable.

CONCLUSION

The decision of the Court of Appeals for the Fourth Circuit should be affirmed.

August, 1999

Respectfully submitted,

KENT S. SCHEIDEGGER

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APPENDIX A

U. S. 10th Circuit Court of Appeals
DODSON v SCOTT

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

DAVID LEE DODSON, Petitioner-Appellant, v. H.N. SCOTT, Respondent-Appellee.	No. 97-6320 (D.C. No. 97-CV-727) (Western District of Oklahoma)

ORDER AND JUDGMENT[1]

Before **BALDOCK**, **EBEL** and **MURPHY**, Circuit Judges.

David Lee Dodson was convicted of rape in the first degree, anal sodomy, rape in the second degree by instrumentation, and oral sodomy. (R. 1 at 2; R. 14 at 1.) He appeals the district court's denial of his petition for a writ of habeas corpus, *see* 28 U. S. C. § 2254 (West. Supp. 1997), and its denial of his request for a certificate of appealability, *see* 28 U. S. C. § 2253(c)(2) (West Supp. 1997). (R. 16, R. 24.) We grant a certificate of appealability only upon a "substantial showing of the denial of a constitutional right." 28 U. S. C. § 2253(c)(2).

Because Dodson's petition was filed after April 24, 1996, it is subject to the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). *See Lindh v. Murphy*, 117 S. Ct.

2059, 2068 (1997). Under AEDPA's amendments to § 2254, we may only grant a writ of habeas corpus if the state's adjudication of petitioner's claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U. S. C. § 2254 (West Supp. 1997).

Dodson claims that the evidence presented at trial was insufficient to support his conviction. Consequently, the appropriate Supreme Court case is *Jackson v. Virginia*, 443 U. S. 307, 319 (1979) ("[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."). The Oklahoma Court of Criminal Appeals recognized the applicability of *Jackson*, and its determination was not "contrary to" or "an unreasonable application of" *Jackson*'s holding. *See Dodson v. State*, No. F-83-767, at 4-5 (Okla. Crim. App. Dec. 18, 1986) (unpublished). (R. 12, Ex. C at 4-5.)

Dodson has not made a substantial showing of the denial of a constitutional right as required by 28 U. S. C. § 2253(c)(2) (West Supp. 1997). Dodson's request for a certificate of appealability is DENIED and his appeal is DISMISSED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT

David M. Ebel

Circuit Judge

FOOTNOTES

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1. After examining appellant's brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(f) and 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

TERRY WILLIAMS, *Petitioner*,

v.

JOHN B. TAYLOR, Warden, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, IDAHO, ILLINOIS, KANSAS, LOUISIANA, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WASHINGTON, AND WEST VIRGINIA IN SUPPORT OF RESPONDENTS

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O'Connor, *Trends in the Relationship between the Federal and State Courts from the Perspective of a State Court Judge* 22 Wm. & Mary L.R. 801, 815 (1981)	2

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Remington, *Change in the Availability of Federal Habeas Corpus: Its Significance for State Prisoners and State Correctional Programs* 85 Mich.L.R. 570, 575-579 (1986) 14

Federal Habeas Corpus Review of State Judgments 22 U.Mich.J.L.Rev. 901 (1989) SB 2301, 99th Cong., 2d. sess., § 5 (1986) 14

Sutherland Stat. Const. 325 [§ 48.04] (5th ed.) 22

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IN THE SUPREME COURT OF THE UNITED STATES

No. 98-8384

TERRY WILLIAMS, *Petitioner*,

v.

JOHN B. TAYLOR, Warden, *Respondent*.

INTEREST OF AMICI CURIAE

Amici states' interests are served by resolving the questions presented as to the interpretation of the "new, highly deferential" standard of review in 28 U.S.C. section 2254(d).[1] Amici defend presumptively valid state court judgments against federal habeas corpus challenges. Since the 1950's, the states have advocated legislative reform of federal collateral review and supported the Anti-Terrorism and Effective Death Penalty Act's purpose to enhance amici's capacity to control their own adjudications. *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997). State courts are equal partners with federal courts in our national judicial system. Amici states are principally responsible for the administration of criminal justice and they have a recognized interest in the finality of their courts'

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1. Hereinafter also referred to as "2254(d)." Amici's brief is confined to the statutory construction and legislative history of 2254(d) as they relate to questions 2 and 3 of the questions presented in this case. Amici are confident Respondent will satisfactorily brief the other substantive issues presented in this case.

judgments. They are equally bound by the Constitution and subject only to the decisions of this Court. Section 2254(d) accords state courts the deference to which they are entitled in a system of federalism consistent with the secondary and limited role of federal collateral review. "In this way perhaps parity will become less a myth and more a reality." O'Connor, *Trends in the Relationship between the Federal and State Courts from the Perspective of a State Court Judge*, 22 Wm. & Mary L.R. 801, 815 (1981).

SUMMARY OF ARGUMENT

The new 2254(d) standard of review for habeas corpus cases precludes relief whenever the state court adjudicated the merits of a federal claim -- whether the adjudication comprised a question of law, a "mixed question" of law and fact, or a fact question -- and the prisoner's entitlement to relief would have been debatable among reasonable jurists, regardless of whether the federal court otherwise would have resolved the claim differently. The language and structure employed in 2254(d), the Congressional debate, and Congress' awareness of this Court's jurisprudence as to qualified immunity, the exclusionary rule and the rule of non-retroactivity, evince a legislative intent to bar relief, on all claims subjected to a state merits adjudication, unless the state court had acted unreasonably. They also reflect that the determination of reasonableness is to made in accord with the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989) (plurality op.), and that the determination applies to adjudications of mixed questions of law and fact pursuant to "clearly established" federal law as determined by this Court. In this way, 2254(d) operates as the "deference" standard described by every member of Congress who spoke to the question in the debates leading to enactment. It does not preclude federal review merely because the states offer a "full and fair opportunity" to raise constitutional claims. However, the Fourth Circuit was correct when it interpreted 2254(d) as authorizing habeas relief "only when the state courts have decided the question by interpreting or applying the relevant precedent [of this Court] in a manner that reasonable jurists would all agree is unreasonable." *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998).

ARGUMENT

I.

THE STATUTORY LANGUAGE AND CONGRESSIONAL HISTORY OF 2254(D) DEMONSTRATE THAT CONGRESS ESTABLISHED A RULE OF DEFERENCE TO REASONABLE STATE COURT DECISIONS IN FEDERAL HABEAS CORPUS PROCEEDINGS

As part of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended 28 U.S.C. section 2254(d) to read as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

A. The Language of 2254(d) Reveals and Reflects Its Legislative History

"In determining the scope of a statute, we look first to its language." *United States v. Turkette*, 452 U.S. 576, 580 (1981). The rules of statutory construction "exist to discover . . . the Congressional will." *Huddleston v. United States*, 415 U.S. 814, 831 (1974).

Under the terms of 2254(d)(1), relief on a claim adjudicated in state court "shall not be granted" unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, *clearly established* Federal law, as determined by the Supreme Court of the United States." (*Emphasis added.*) These words resonate settled meanings. The phrase "clearly established" is a special term familiar from this Court's jurisprudence in the field of qualified immunity for government officials charged with violations of federal law. *See Anderson v. Creighton*, 483 U.S, 635, 639 (1987); *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982).

As this Court has also recognized, there is an obvious consanguinity between the concept of "clearly established" law in the immunity area and the *Teague* doctrine of non-retroactivity for new rules of constitutional law. *Teague v. Lane*, 489 U.S. at 288 (plurality op.); *Sawyer v. Smith,* 497 U.S. 227, 236 (1990); *Wright v. West*, 505 U.S. 277, 312-3 (Souter, J.conc. op.). The AEDPA generally ratified this Court's *Teague* non-retroactivity doctrine prohibiting habeas corpus relief predicated upon the application of a "new rule"of constitutional law about which reasonable judges might have debated at the time of finality of the state criminal judgment. *See Sawyer,* at 234; *Butler v. McKellar*, 494 U.S. 407, 414 (1990). In unmistakable references to the *Teague* rule in the relief-restricting habeas corpus reforms of the AEDPA, Congress ratified the non-retroactivity doctrine as part of the context in which the reforms, including that of 2254(d), would operate.[2] It cannot reasonably be denied

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2. The AEDPA repeatedly references the "new rule" and "retroactivity" doctrine for collateral review. *See, e.g.* 28 U.S.C. § 2244(b)(2)(A) (successive petitions), §2244(d)(1)(C) (period of limitations), § 2254(e) (evidentiary hearings), § 2264(a)(2) (unexhausted claims). *See Green*, 143 F.3d at 873-874. Petitioner and counsel of record for amicus ACLU both agree that the AEDPA at

that Congress understood that the *Teague* doctrine in fact would continue to operate in the broader context of the reforms.

Thus, Congress intended to import the judicially-recognized meaning of "clearly established law" from the immunity field and the *Teague* doctrine of non-retroactivity to the habeas corpus reform embodied in 2254(d). *See C.I.R. v. Keystone Consolidated Industries, Inc.*, 508 U.S.152, 159 (1993). There is no indication in either the plain language of the statute or its legislative history that Congress intended to change the judicially created interpretation or meaning of this language. *Kelly* v. *Robinson*, 479 U.S. 36, 47 (1986); *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989); *United States* v. *Shabani*, 513 U.S. 10, 133 (1994).

The 2254(d) requirement that a state adjudication be evaluated by reference to what had been "clearly established" law is highly significant. It replicates *Teague* in validating "reasonable, good-faith interpretations" of the law at the time of the challenged action, *Butler*, 494 U.S. at 414. And it confirms the plain statutory language according deferential review of "mixed questions" involving the application of federal law to the peculiar facts of each case.

Congress was presumably aware in 1996 that under the *Harlow* line of cases, government officials were entitled to immunity "as long as their actions *could reasonably have been thought* consistent with the rights they are alleged to have violated." *Anderson*, 483 U.S. at 638-641 (*emphasis added*). The government official was broadly protected under the "clearly established law" standard unless "in light of pre-existing law" the unlawfulness of his conduct in the circumstances was

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least "codifies" *Teague*. Amici note that ACLU's counsel earlier propounded exactly the opposite. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buff.L.R. 381, 416 (1996).

"apparent." *Id.* at 640. For example, immunity applied to "reasonable[e] but mistaken[]" evaluations on whether a peculiar array of facts rose to the level of "probable cause" to qualify a search and seizure as "reasonable" under the Constitution. *Id.* at 641.

Section 2254(d), therefore, prescribes deferential review for objective reasonableness for any claim adjudicated on the merits by the state court, even a "mixed question" as in *Anderson*, as measured by reference to clearly established law." Section 2254(d) embraces and enlarges the *Teague* inquiry. *See Wright v. West*, 505 U.S. at 291 n. 8 (Rehnquist, C.J., Thomas, Scalia, JJ. plur. op.), 304-305 (Blackmun, Stevens, O'Connor, JJ. conc. op.), 307 (Kennedy, J. conc. op.). Under *Teague* and its progeny, relief from custody depends upon review for "objective reasonableness" of the state court result, measured by whether reasonable jurists at the time of finality might have debated the validity of the purported rule of law proffered by the prisoner or whether "all reasonable jurists" would have been of one mind in validating the federal claim so that "no other interpretation was reasonable." *Stringer* v. *Black*, 503 U.S. 222, 227, 237 (1992); *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997); *Lambrix v. Singletary*, 520 U.S. 518, 538 (1997). Under 2254(d), review on any claim adjudicated on the merits is, in essence, a *Teague*-type inquiry into whether "the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable." *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998); *accord*: *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996) ("[W]e can grant habeas relief only if a state decision is so clearly incorrect that it would not be debatable among reasonable jurists"); *see Lindh v. Murphy*, 96 F.3d 856, 870 (7th Cir. 1996), rev'd on other grounds, 521 U.S. 320, vacated and remanded; *Holman v. Gilmore*, 126 F.3d 876, 880 (7th Cir. 1997).

The conclusion that the "clearly established law" criterion prescribes *Teague*-plus deferential review for merits adjudications, even those involving "mixed questions," finds further support in other portions of the text of 2254(d). Even aside from the "clearly established federal law" language that applies to state adjudications across the board, the new standard explicitly provides that relief may not be granted unless, as noted above, the state adjudication "resulted in a decision that was *contrary to, or involved an unreasonable application* of, clearly established Federal law . . . ." (*Emphasis added.*)

Although amicus ACLU denies it (ACLU Br. 10), an "application" of federal law literally comprises an application of federal law to the particular facts of the case under review. The ACLU makes a failed attempt to conjure the notion of an "application of law" to a novel setting as something disconnected from an application of law to facts. (ACLU Br. 10.) But the statutory language does not speak of any "novel setting" limitation; instead, it speaks broadly of any "application" of federal "law." And, anyway, even the concept of an application of law to a novel setting ultimately can mean nothing more than the application of law to the facts that make up the novel setting. Conversely, nothing in the text of the statute explicitly excludes "application of law to facts" from the general provision providing for deferential review of state court adjudications involving an "application" of clearly established federal "law."

The deference to reasonable "applications of . . . clearly established federal law" to "mixed questions" is also clear from 2254(d)'s overall structure. It provides a relief-precluding standard of review for, in sequence, state court adjudications that result in rulings (1) that were contrary to clearly established federal law, (2) that involved an unreasonable application of clearly established federal law, or (3) that were based on an unreasonable determination of the facts. That hierarchical structure

itself is a parallel to legal questions, mixed questions, and fact questions. It mirrors the well-recognized continuum of "pure law," "mixed questions," and historical facts. Courts of Appeals have drawn the obvious conclusion from the structure and the text. *See Furman v. Wood*, 169 F.3d 1230, 1232 (9th Cir. 1999); *Neeley v. Nagle*, 138 F.3d 917, 923-4 (11th Cir. 1998); *Drinkard*, 97 F.3d at 767; *Lindh v. Murphy*, 96 F.3d at 767-8. And, even if one might doubt the formal parallel, the practical effect "probably will not lead to different results." *Harpster v. State of Ohio*, 128 F.3d 322, 327 (6th Cir. 1997.)[3]

Just as the "unreasonable application" standards drives home the deference accorded by the "clearly established federal law" criterion for mixed questions of law and fact, the "contrary to" standard confirms deferential review for reasonable-if-mistaken adjudications of pure questions of law. To say an adjudication is "contrary to" clearly established Supreme Court precedent denotes something more than saying that the adjudication in retrospect was incorrect. "Contrary" means "diametrically different," "opposite in character or nature," "mutually opposed." Webster's Third New

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3. The ACLU concocts a construction in which federal courts would have de novo review of the application of "clearly established" rules of this Court while deferentially reviewing the state court's bare invocation of this Court's rule or application of "law" when this Court has not established a "rule", a "novel" setting. Under the ACLU's construction, de novo review would remain for state court decisions under such generalized rules and "mixed questions" as those enunciated by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984), *Brady v. Maryland*, 373 U.S. 83 (1963) and *Boyde v. California*, 494 U.S. 370(1990). Neither the language nor legislative history support such feeble reform, such an unnatural reading of the statute, and such a legal gymnastic as applying nonexistent "law" in a vacuum. Petitioner's and ACLU's contrivance would nullify the "new, highly deferential" 2254(d) standard. *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 900 (1999) (Becker, C.J., conc.).

International Dictionary 495; Random House College Dictionary ("1. Opposite in nature or character; diametrically or mutually opposed"). Consistent with this literal meaning, this Court's *Teague* cases indicate that decisions can be "contrary to" law when a particular result is strictly "dictated" or "compelled" by precedent, rather than when it is merely "governed" or "controlled" by precedent so that reasonable jurists might have reached differing conclusions. *See Butler*, 494 U.S. at 414-415; *see also Caspari* v. *Bohlen*, 510 U.S. 383, 114 S. Ct. 948, 956 (1994); *Graham* v. *Collins*, 506 U.S. 461, 467 (1993); *Lockhart* v. *Fretwell*, 506 U.S. 364, 373 (1993); *Wright*, 505 U.S. at 311 (Souter, J. conc.); *Stringer* v. *Black*, 503 U.S. 222, 225 (1992); *Sawyer* v. *Smith*, 497 U.S. at 234; *Saffle* v. *Park*, 494 U.S. 484, 488 (1990).[4] A state court that entertains a plausible opinion will not have its decision overturned under 2254(d). *See also Graham*, at 473-477.

The meaning is reinforced when the "contrary to" standard is placed in the proper context that requires it to be applied with reference to "clearly established federal law" as determined by this Court's jurisprudence. As noted above, the "clearly established federal law" rule provides deferential review for reasonable interpretations of law even if mistaken. It makes little sense to read the "contrary to" phrase to permit later second-guessing of a reasonable state adjudication by a federal court so that the standard would be at war with itself. For example, in deferentially reviewing an agency's construction of the statute it administers, to determine if the agency's action should be reversed under a statutory "contrary to law" standard, the federal court will uphold the action if based upon a "permissible construction" of the law. The

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4. It is also significant that the "contrary to" standard in the *Teague* cases apply to questions of pure law. *Wright*, 505 U.S. at 294. (Thomas, I. plur. opn.) This further reenforces amici's construction of the "unreasonable application" as applying to mixed questions.

federal court's task is a narrow inquiry into whether the agency's construction is "sufficiently reasonable." "To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached. . . ." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 38-39 (1981).[5] The age-old standard of review under the Supremacy Clause for determining federal preemption of state law is whether the state law "interfere[s] with or [is] contrary to, the laws of Congress. . . ." *Gibbons* v. *Ogden*, 9 Wheat 1, 211 (1924). Preemption under this standard is not favored unless "the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963); *Chicago & Northwestern Transportation Co.* v. *Coil Brick & Tile Co.*, 450 U.S. 311, 317 (1979); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981).[6]

Petitioner and the ACLU say that reading the "contrary to" clause to apply to pure legal questions makes the clause a mere "cipher" employed only in the remote event that the state court fails to articulate a rule clearly established by this Court's cases. (P. Br. 39;

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5. This standard was also referenced in the Senate debate. 141 Cong. Rec. S7842 (remarks of Sen. Biden referring to the "Chevron" case [*Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843-844 & fn. 11 (1984)].)

6. The Federal Magistrate Law gives the district court judge the power to overturn non-dispositive orders by the Magistrate-Judge that are "clearly erroneous or contrary to law." While the district court judge makes an independent or plenary or de novo review of the magistrate's legal conclusions, the judge will uphold the order even if the judge would have issued a different order. *See, e.g. Grimes* v. *City and County of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991) ("The reviewing court [district court] may not simply substitute its judgment for that of the deciding court [magistrate].")

ACLU 9.) However, that has not been amici's experience under the *Teague* doctrine. *See, e.g. Stringer*, 503 U.S. at 225; *Penry v. Lynaugh*, 492 U.S. 302 (1989). Ironically, Petitioner alleges just such a "remote" transgression in this case: he says the state court misinterpreted the prejudice rule of the ineffective-counsel criteria to require a showing of an unfair trial rather than a showing of mere effect on the ultimate outcome. (P. Br. 11-22.) It might be true that few state adjudications will be discarded under the standard, just as this Court, in its *Teague* jurisprudence, has rarely identified a proffered rule as "old" or established and invoked it to grant habeas corpus relief to a state prisoner. But that would not make the "contrary to" language a nullity, any more than the *Teague* doctrine has been a nullity. The value of the "contrary to" standard as interpreted by the amici in this brief lies in, for one thing, providing a framework for analyzing all-too-common allegations of egregious violations of the clear constitutional law by the state courts. *See, e.g., Smith v. Robbins*, No. 98-1037 (cert. granted March 8, 1999) (claim that state court violated clear rule dictated in *Teague* sense by *Anders v. California*). In doing so, it promotes comity, efficiency, and finality by providing new *Teague*-plus protection, in instances where the state court adjudicated the merits of a prisoner's federal claim, so that criminal judgments based upon state-court interpretations of Supreme Court precedents within the range of reasonable debate will not be disturbed years afterward in later federal habeas corpus attacks.

B. Legislative History Supports Amici's Construction of 2254

Amici recognize that resort to legislative history and secondary materials is ordinarily unnecessary. However,

legislative history supports amici's construction of 2254(d). *Negonsott v. Samuels,* 507 U.S. 99, 106 (1993).

The Congressional AEDPA debate focussed on three distinct proposed standards of review: (1) the "deference" standard now set forth in 28 U.S.C. § 2254(d) (S. 735 as amended by the Specter-Hatch Amendment, No. 1199); (2) an "inadequate or ineffective" standard patterned after *Stone v. Powell*, 428 U.S. 465 (1976) (Kyl Amendment. No. 1211); and (3) the pre-AEDPA de novo review standard (Biden Amendment, No. 1224). The ensuing debate demonstrates that the Senate intended 2254(d) to be a rule of deference, most recently defined by Justice Kennedy as "saying that since the question is close the state-court decision ought to be deemed correct because we are in no better position to judge." *Wright,* 505 U.S. at 308 (Kennedy, J. conc. opn.) The ACLU's contrived suggestion otherwise finds no support in the history of the AEDPA.

The Specter-Hatch Amendment was initially a "consensus bill [S. 623, the "Habeas Corpus Reform Act of 1995] to enact meaningful reform of the Federal habeas corpus process." Among a series of features, the bill "ensures that proper deference is given to the judgments of State courts. . . ." 141 Cong. Rec. S4590-S4596 (Sen. Hatch). The bill was later folded into the AEDPA's predecessor, the Comprehensive Terrorism Prevention Act of 1995 (S. 735, Amendment 1199). 141 Cong.Rec. S7479, S7803. (May 25,1995; June 6, 1995)[7] Ultimately, the

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7. The "consensus bill" comprised various provisions relating to timetables and omitting Senator Specter's proposal to eliminate the exhaustion requirement. 141 Cong.Rec. S4590-4596, S7847. Senator Specter spoke in opposition to the Biden Amendment which would have stricken the Specter-Hatch "deference" standard. He characterized his bill as a "reasonable compromise." He compared the Specter-Hatch amendment to the more "restrictive" House bill which limited review to "arbitrary" state court decisions. He did not characterize the Specter-Hatch Amendment any differently than did

amendment became part of the AEDPA. 142 Cong.Rec. H3305 (1996).

Subsequently, Senator Hatch described the standard now in 2254(d) as the "single most important provision in the habeas reform proposal . . . ." 141 Cong.Rec. S7846 (June 6, 1995); *see also id.* at S7841 (Sen. Biden's recognition of the review standard as "the single most

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his co-sponsor Senator Hatch. 141 Cong. Rec. S7846-7847. Amici note that prior to the Specter-Hatch Amendment, previous Congresses had considered proposals to limit review to claims which had not received "full and fair" adjudication in state court. In 1986, SB 2301 was introduced in the Senate. The bill limited any claim of error to claims that had not been "fully and fairly adjudicated" in state court. SB 2301, 99th Cong., 2d. sess., § 5 (1986). The Department of Justice and the sponsor both explained that "fully and fairly adjudicated" included a result that was "reasonable" as opposed to the "full and fair opportunity" standard for review of Fourth Amendment claims under *Stone v. Powell*. However, the language was criticized for not being explicit about that distinction Remington, *Change in the Availability of Federal Habeas Corpus: Its Significance for State Prisoners and State Correctional Programs*, 85 Mich.L.R. 570, 575-579 (1986). There were repeated introductions of the unadorned "fully and fairly adjudicated" language. *See, e.g.* 131 Cong.Rec. S568 (SB.239) (1985); 132 Cong.Rec. S4211 (SB. 2301) (1986); 133 Cong.Rec. S18397 (SB.1970) (1987); 135 Cong.Rec. S412 (SB.88) (1989); 137 Cong.Rec. S3192, S8558, S8573 (SB. 635) (1991) citing S.Rep. No. 226, 98th Cong., 1st Sess. (1983) and *Federal Habeas Corpus Review of State Judgments*, 22 U.Mich.J.L.Rev. 901 (1989); 137 Cong.Rec. E920 (HR. 1400); 138 Cong. Rec. S2693 (1992); 141 Cong.Rec. S76 (SB. 3) (1995); *see also* Statement of Associate Deputy Attorney General Andrew G. McBride, House Subcomm. on Civil & Constitutional Issues (HR. 1400) (102nd Cong.) (June 27, 1991) Senator Specter supported bills with the "fully and fairly adjudicated" language although he had echoed the concerns about its definition. 137 Cong.Rec. S8622, S8649, S8656, S8649, S8665, S8558. The 2254(d) standard dealt with these concerns by explicitly articulating the "reasonableness" component that distinguishes deference from the "full and fair opportunity" limitation that still independently applies to Fourth Amendment claims on collateral review. *See, e.g. Withrow v. Williams*, 507 U.S. 680 (1993).

important provision" of the bill).[8] Senator Hatch explained that the standard would "allow a Federal court to overturn a State court decision only if it is contrary to clearly established Federal law or if it involves an 'unreasonable application' of clearly established Federal law *to the facts*, or if the State court's factual determination is unreasonable." 141 Cong.Rec. S7597 (May 26, 1995), emphasis added.[9] His description contemplated limits on review of questions of law, mixed questions, and questions of fact.[10]

On the other hand, the Kyl Amendment would have prohibited federal habeas corpus relief "unless the remedies in the courts of the State are inadequate or ineffective to test the legality of the person's detention." 141 Cong.Rec. S7787, S7829 (June 6-7, 1995). Proponents of the Kyl Amendment described Specter-Hatch as merely providing a "more deferential" standard of review as opposed to the Kyl Amendment's rigid procedurally oriented limits. *Id.* at 7830; *see also* comments by Senator Lott, *id.* at S7835. Both Senators Specter and Hatch

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8. Amici properly rely on the explanations of the sponsors in giving meaning to 2254(d). The statements of opponents are referenced either to give meaning to the sponsors' statements or to illustrate the unanimity of opinion as to the deferential meaning of 2254(d). *See NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964).

9. Senator Biden, in opposition, agreed that Specter-Hatch would apply to "matters of fact and law at a Federal level." 141 Cong.Rec. S7841.

10. Amicus ACLU finds significance that the House of Representative adopted a provision that specifically referred "to the facts," but that language is not in 2254(d). (ACLU at 29.) The bill was passed by the House, but was not considered by the Senate. There is nothing in the legislative history to suggest that 2254(d) reflects a conscious rejection of superfluous "to the facts" language in a House bill that never made it over to the Senate. The Senate debate operated on exactly the opposite premise.

opposed the Kyl amendment because they supported retaining some postconviction habeas corpus review. *Id.* at S7834, S7836.

Debate then turned to the Biden amendment "deleting the rule of deference for habeas corpus." *Id.* at S7840. Senator Cohen opposed the "deference provision" of Specter-Hatch "requiring a Federal court to defer to a State court's reasonable interpretation and application of constitutional law." He favored federal courts retaining independent review over mixed questions of law and fact. *Id.* at S7838-S7839.

According to Senator Biden, Specter-Hatch would dramatically restrict[]" federal court power to decide that a State court "got it wrong." In the his view "Federal courts should exercise independent review while the Specter-Hatch bill requires Federal courts to defer to the State." He opposed federal court deference to "reasonable" state court decisions based on whether "reasonable minds could differ." According to Senator Biden, Specter-Hatch established "an extraordinary deferential standard . . . ." He acknowledged that to warrant habeas corpus relief under Specter-Hatch the state court decision "must have been unreasonable in light of Supreme Court law that is clearly established." The Biden amendment would "strike[] the deference rule and allow[] the current practice of independent review by the court." *Id.* at S7840-7842, S7486.

Senator Biden compared previous "battles" over the "full and fair" standard of habeas corpus review to the "inadequate or ineffective" standard in the Kyl amendment. Despite the express opposition of Senators Specter and Hatch to the Kyl amendment, Senator Biden asserted their amendment "essentially does the same thing" and "would have virtually the same effect" as a full and fair standard because "it would require deference to the State decision unless that decision were unreasonable." *Id.* at S7843; S7486, S7841 (Sen. Biden's reference to "the

so-called rule of deference, which has been known around here the last 20 years that I have been here as the full and fair rule") Senator Biden suggested that "independent review is the only sensible approach . . . ." Otherwise, he argued, the "deference rule" in Specter-Hatch would prevent a federal court from "correcting" a state court decision. *Id.* at S7845.

Senator Hatch explained the difference between his approach and Senator Biden's:

> I know there are people here who believe that only the Federal courts tell the truth. That just is not true. State courts, in many respects, are just as good, if not better, than the Federal courts--in these areas, just as good.

Id. at S7846.

Because state courts "are constrained to uphold the Constitution and faithfully apply Federal law" there "is simply no reason" for federal courts to "virtually retry" cases resolved by the state courts. *Id.* at S7846.[11]

Under the pre-AEDPA approach advocated by Senator Biden, federal courts had "virtual de novo review" of state court decisions. The Specter-Hatch amendment, however, required federal courts "to defer to the determination of State courts" unless that decision was

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11. Ironically, during the Senate debate, Senator Biden argued that a federal "appeals court had recently held that a defendant could not be prosecuted criminally and have his properly forfeited under the civil forfeiture laws because of the double jeopardy clause prohibiting that. . . . It is not a Supreme Court ruling. Under this bill, a State court, which subsequently refused to follow that interpretation, could not be corrected by habeas corpus review because it could never get back into the Federal court system." 141 Cong.Rec. S7842. Of course, Senator Biden's hypothetical state court decision was vindicated when this Court corrected the federal appeals court on this issue. *United States v. Ursery*, 518 U.S. 267 (1996).

contrary to or an unreasonable application of federal law as determined by this Court. This "appropriate standard" allowed federal courts to overturn state decisions that "clearly contravene Federal law" or "improperly apply clearly established Federal law." Senator Hatch's objective of ending spurious federal habeas attacks on state judgments could not occur "without changing the standard under which these petitions are reviewed." In short, the disagreement over the appropriate standard of review involved "differing visions as to the proper role" of federal habeas corpus. *Id.* at S7846-S7848.

Senator Specter explained that 2254(d) required "deference to the determinations of the State court" unless the federal court found the state decision contrary to or an unreasonable application of this Court's precedent or resulted in a decision based on an unreasonable determination of the facts in light of the evidence. This was not as "restrictive" a standard as the House proposal to allow federal habeas relief only when the state court decision was "arbitrary". *Id.* at S7847. Or, in other words, equivalent to the Kyl "inadequate or ineffective" standard.

Senator Hatch returned to Specter-Hatch and asserted its purpose was to limit federal habeas review to unreasonable application of federal law by state courts. "It enables the Federal court to overturn State court decisions that clearly contravene Federal law" or "improperly apply clearly established Federal law." Senator Hatch added, "if the State court unreasonably applied Federal law its determination is subject to review by the Federal courts." Where the state decision is reasonable, however, there is no basis for federal court intervention. The contrary argument demonstrated a "fundamental[] distrust" of state courts that was "an insult to all of the wonderful, fine State court judges around this country." *Id.* at S7848.[12/]

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12. In the course of his comments Senator Hatch stated that the

In particular, Senator Hatch said:

> What does this mean? It means that if the State court reasonably applied Federal law, its decision must be upheld. Why is that a problematic standard? After all, federal habeas review exists to correct fundamental defects in

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standard in § 2254(d) "essentially gives the Federal court the authority to review *de novo* whether the State court decided the claim in contravention of Federal law." 141 Cong.Rec. S7848 (June 7, 1995), emphasis added. Cobbling together that passage with earlier remarks, the ACLU asserts from the emphasized passage that Senator Hatch conceded the AEDPA review standard still authorized de novo review of state court judgments for correctness as opposed to their reasonableness. (ACLU at 28.) Read in context Senator Hatch recognized only that a federal court would necessarily have to determine for itself the applicable Supreme Court precedent against which it would decide the reasonableness of the state court decision. This is no different than review under *Teague* or under the "good faith" exception to the exclusionary rule. *Wright*, 505 U.S. at 305 (O'Connor, J. conc.) Given the tenor of his remarks as a whole and when considered in context, any suggestion that Senator Hatch did not intend the enactment of a standard requiring federal court deference to reasonable state court interpretations and applications of this Court's decisions is disingenuous at best.

The ACLU similarly misinterprets comments made by Representative Hyde during debate in the House on the conference report supporting what is now the AEDPA. (ACLU Br. 28-29 n.50.) He noted that a federal judge "always reviews the State court decision to see if it is in conformity with established Supreme Court precedents, or if it has been misapplied. So it is not a blank, total deference, but it is a recognition that you cannot relitigate these issues endlessly." 142 Cong.Rec. H3602 (April 18, 1996). When read as whole instead of the truncated excerpt quoted by the ACLU, it is clear that Representative Hyde, like Senator Hatch, simply acknowledged that a federal court must determine the applicable precedent before considering the reasonableness of the state court's action. Representative Hyde also argued that there was no reason to believe that state judges would be "less sensitive" or "less scholarly" than federal judges. *Id.* at H3603.

> the law. If the State court has reasonably applied Federal law it is hard to say that a fundamental defect exists.
>
> The Supreme Court in Harlow versus Fitzgerald has held that if the police officer's conduct was reasonable, no claim of damages under Bivens versus Six Unknown Agents can be maintained.
>
> In Leon versus United States [sic], the Supreme Court held if the police officer's conduct in conducting a search was reasonable, no fourth amendment violation ensues or would obtain, and the court could not order suppression of the evidence obtained as a result of that search."

141 Cong.Rec. S 7848-7849.

Senator Hatch's dramatic twin invocations of *Harlow* and *Leon* are the most instructive and dispositive moments of the 2254(d) debate. The significance of the *Harlow* analogy has already been explained. In addition, *United States* v. *Leon,* 468 U.S. 897 (1984) held the exclusionary rule did not bar the admission of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate even though the warrant was unsupported by probable cause. This Court found that "the affidavit related the results of an extensive investigation and, as the opinions of the divided panel of the Court of Appeals make clear, provided evidence sufficient to *create disagreement among thoughtful and competent judges* as to the existence of probable cause." *Id.* at 926. (emphasis added).

Significantly, the United States Supreme Court also cited *Leon* in *Butler* to support the proposition that the "new rule" principle of the *Teague* doctrine of non-retroactivity "validates reasonable, good-faith

interpretations of existing precedents made to state courts even though they are shown to be *contrary* to later decisions." *Butler*, 494 U.S. at 414. (italics added). *Butler* cites *Leon* to the effect that the exclusionary rule should not be applied to the police when "it cannot be expected . . . to deter objectively reasonable law enforcement activity." *Id.* citing *Leon, supra,* 494 U.S. at 918-919; *see also Wright,* 505 U.S. at 311 (Souter, J. conc.). The intent of the sponsors to establish a standard based on deference to "reasonable jurists" could not be clearer.[13]

Following this debate the Senate rejected the Kyl amendment, tabled the Biden amendment to strike the deference standard, and passed S. 735 with the Specter-Hatch version of habeas corpus reform. 141 Cong. Rec. at S7849-S7850, S7857, S7869, D691. In light of the debates 2254(d) was clearly intended to require federal habeas court deference to state court decisions unless the state court result was unreasonable in light of applicable precedent from this Court. A mere difference of opinion between state and federal courts would not permit the assumption that the federal court was "correct" and the state court "incorrect." In short, a state court decision which reasonably applies this Court's precedent cannot be incorrect, however much the lower federal court might disagree with the state interpretation.

The debate on the merits of deferential review of the state court's application of federal law to the individual facts of a case took place, moreover, in view of this

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13. As Judge Reinhardt explained in *United States* v. *Fowlie,* 24 F.3d 1059, 1066-1067 (9th Cir. 1994) the review for the *Leon* exception is de novo, but the de novo inquiry is directed at "'whether the affidavit was sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause.'" *Id.* at 1607 quoting *Leon, supra.* In debate, Senator Biden agreed with the *Leon* analogy drawn by sponsor Senator Hatch. 141 Cong. Rec. S7843.

Court's earlier inconclusive consideration of the question in *Wright*, 505 U.S. 277. The prior state of the law, as reflected in a judicial opinion like *Wright*, is relevant to determining the intent underlying the statute. Vol.# Sutherland Stat. Const. 325 [§ 48.04] (5th ed.); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). And Congress in fact was aware of *Wright*. Senators Biden and Moynihan referred to *Wright* by name, and to Justice O'Connor's concurring opinion, as purported support for their argument against a standard that they acknowledged would require federal court deference to a state court's incorrect but reasonable legal determination. 141 Cong. Rec. 7843-7844 (Sen. Biden); 142 Cong. Rec. S3440 (Sen. Moynihan). Justice O'Connor's concurring opinion in *Wright* noted that Congress had considered taking the step of enacting a deferential standard for mixed questions in the past, 505 U.S. at 305-6 (conc. op.); and the plurality opinion, though declining to decide the point, had outlined an argument that *Teague* had implicitly questioned the propriety of de novo rather than deferential review of mixed questions and that logic dictated deference with respect to such questions along the lines of the kind of deference that already unquestionably existed for legal questions and factual question, *id.*, at 291-295 (plur. op.).

Congress manifestly intended to restrict the availability of habeas corpus relief for claims reasonably adjudicated in the state courts. In enacting 2254(d) and embracing across-the-board deferential review, Congress took the "far reaching" step this Court declined to take in *Wright*, at least partially because Congress had up until that time failed to endorse legislation for such review. In the course of doing so, the Senate echoed its earlier vote to reject Senator Biden's proffered amendment, which would have deleted the new standard from the bill entirely, a vote that itself was a vote against de novo review of mixed questions.

That both sides in the debate understood they were enacting a deference standard is further demonstrated by efforts to recommit following the conference report accompanying the AEDPA. The conference report explicitly stated that the agreed-upon habeas corpus reform "requires deference to the determinations of state courts that are neither 'contrary to,' nor an 'unreasonable application of,' clearly established federal law." House Conf. Rep. No. 104-518, 1996 U.S. Code & Admin. News 994. *Thornburg v. Gingles*, 478 U.S. 30, 75 (1985). In post-conference debate, some senators, including co-sponsor Senator Specter, expressed their concerns about any requirement that federal courts defer to state court legal determinations. *See, e.g.*, 142 Cong.Rec. S3458, S3465 S3470-3472 (April 17, 1996) (comments of Sen. Kennedy, Sen. Dodd, Sen. Specter respectively).[14/]

Responding to Senator Moynihan's concern that the "practical effect" of 2254(d) was to unconstitutionally suspend the writ of habeas corpus, Senator Hatch explained that the legislation involved only the "statutory form of habeas corpus," not the "Great Writ" contained in the Constitution. He explained that "deference to State law is good, because it just means that we defer to them if they have properly applied Federal law." Senator Hatch repeated that a federal court could intervene only if the state court decision were unreasonable since state courts no less than federal courts are obligated to enforce federal

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14. According to Senator Specter, 2254(d) requires deference to state court findings of fact and to state court application of federal law to the facts, but "Federal courts will owe no deference to State courts' determinations of Federal law . . . ." 142 Cong.Rec. S3472 (April 17, 1996). Amici agree with Senator Specter that federal courts must determine the appropriate Supreme Court precedent. Any suggestion that the statute allows federal courts to reject state court interpretations of federal law simply because they disagree would be inconsistent with his earlier comments and the purpose of the statute.

rights and are just as capable of doing so. *Id.* at S3439, S3446-3447.

The standard enacted by Congress in 2254(d) is one of deference to state court determinations of law, facts, and application of law to facts. Both the proponents and opponents of this provision agreed the statute had this effect. It did not effectively eliminate federal habeas corpus review of substantive adjudications as the Kyl amendment might have done nor did it continue the de novo standard as Senator Biden hoped. Congress simply provided that a mere disagreement among state and federal courts on the reasonable interpretation and application of federal law is not alone sufficient to overturn a state criminal conviction.

Therefore, the drafters and Congress understood that the new standard of review would significantly restrict habeas corpus relief in those cases in which the state court actually adjudicated the prisoner's federal claim on its merits. Congress intended that the new standard would be not only consonant with *Teague*, but would afford even further protection for the finality of the state court judgment, including "mixed questions" of "clearly established" law. Indeed, Petitioner acknowledges that Congress meant, in the circumstances described in Section 2254(d), to augment *Teague*-type protection of final state judgments. (P. Br. 29-30.)[15] In order to prevail under 2254(d), a petitioner will need to show that the state court's adjudication of a constitutional claim, both in terms of the law invoked and the law as it was applied to the facts, achieved a result that no reasonable jurist would

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15. Petitioner discerns, among the augmentations, the following: (a) evaluation of the state adjudication as of the time of the adjudication; (b) review with reference to clearly established law "as determined by the Supreme Court of the United States,"and, at least as noted in petitioner Williams' brief; (c) the elimination of the judge-made "exceptions" to the *Teague* rule. (P. Br. 29-31.)

have arguably reached. Any less of a showing substitutes the opinion of a federal court for that of a state court on matters about which only this Court may authoritatively speak. *See, e.g. Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997); *Withrow*, 507 U.S. at 723 (Scalia, J. conc.& dis.). Solely in the event of an irreconcilable conflict between this Court and the state court is a petitioner in custody in violation of the United States Constitution.

CONCLUSION

Amici respectfully request that the decision of the Fourth Circuit Court of Appeals be affirmed.

Dated: August 24, 1999.

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